

The Application of Indiana's Capital Sentencing Law

**Findings of the
Indiana Criminal Law Study Commission**

Senator William Alexa, Chair



**A report to Governor Frank O'Bannon
and the Indiana General Assembly**

**Indiana Criminal Law Study Commission,
2000-2001 and 2001- 2002**

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Executive Summary

Pursuant to the requests of Governor Frank O'Bannon and the Legislative Council of the Indiana General Assembly, the Indiana Criminal Law Study Commission reviewed the following six issues regarding Indiana's application of the death penalty:

I. Safeguards: After reviewing whether safeguards are in place to ensure that an innocent person is not executed, the Commission found a capital case system of "super due process" comprised of multiple, integrated safeguards. Additional safeguards were discussed, with no consensus reached.

The two most important safeguards are quality of the defense and a full, fair review process. Defense attorneys are governed by effective rules promoting quality. The Public Defender provides seasoned capital defenders having institutional expertise and resources. The Public Defender Council provides additional advisory, educational, technical, and research support to the defense. The Public Defender Commission promotes compliance with rules governing quality of defense counsel through its reimbursement for quality defense counsel and unlimited support services including paralegals, mitigation specialists, factual investigation specialists, and other experts. An extensive multi-layered review process offers four avenues of review: direct, post-conviction, habeas corpus, and executive clemency, some of which may be utilized more than once. These safeguards and others help ensure to the best of our human ability that an innocent person is not executed.

II. Quality of Counsel: One of the most important safeguards for a capital defendant is quality of defense counsel. In reviewing whether our special rules requiring definitively trained capital defense counsel are working to ensure that a capital defendant's legal representation is properly qualified, the Commission found a five-part system that provides quality defense counsel and recommended maintaining its continual, adequate funding. Enhancing defense counsel compensation was discussed, with no consensus reached.

Criminal Rule 24 governs competency, training, compensation, workload, and provision of two defense attorneys and any necessary support services. Public Defender office capital counsel are experienced and bring institutional expertise and resources to the defense. The Public Defender Council provides additional advisory, educational, technical, and research support to defense attorneys. The Public Defender Commission promotes compliance with Rule 24. The Public Defense Fund provides reimbursement for capital cases complying with Rule 24. Statistics illustrate the effectiveness of Rule 24: of the 14 Indiana capital sentences reversed due to ineffective assistance of counsel, 13 were imposed before Rule 24 was enacted and the remaining reversal involved violations of Rule 24.

III. Review: Another of the most important safeguards protecting a capital defendant is the review process. The Commission found that while inordinate sentence-to-execution time delays must be eliminated, our review procedures generally result in a full and fair review of non-waived legal issues and recommended ensuring continual, adequate funding for all relevant components of the review process. Conducting a specific comparative analysis between death sentences in addition to the currently conducted proportionality review was discussed, with no consensus reached.

In examining capital case review procedures in place in Indiana and in our federal Seventh Circuit appellate courts, the Commission found that the following four review avenues apply: 1) direct appeal to the Indiana Supreme Court; 2) petition for postconviction relief ("PCR") to the trial court and subsequent appeal of the PCR decision to the Indiana Supreme Court -- successive petitions for PCR may be available; 3) petition for writ of habeas corpus to the federal district court and subsequent appeal of that decision to the Seventh Circuit Court of Appeals -- successive habeas petitions may be available; and 4) appeal to the Governor for clemency. The result of each avenue of review except for the last is itself subject to review by the United States Supreme Court.

IV. Race Neutrality: Whether Indiana imposes capital sentencing in a race neutral manner was examined by studying the cases of 224 individuals who received a determinate sentence, life without parole, or the death penalty for murders committed between July 1, 1993, and August 10, 2001. The study revealed that since July 1, 1993, White offenders have received more severe sentences for murder than Non-White offenders. Although sentencing outcomes for murders committed since July 1, 1993, appear to be less severe for Non-White offenders than for White offenders, this observation may have more to do with the victim's race than with the offender's race. When the victim is White, White offenders and Non-White offenders appear to be sentenced similarly, but when the victim is Non-White, Non-White offenders appear to be sentenced less severely than White offenders. In general, however, the majority of murders in Indiana since July 1, 1993, have been intraracial in terms of the offender and victim being of the same race.

V. Cost Comparison: The Commission used two databases to compare the costs of the death penalty with life without parole ("LWOP"). First, a profile of a typical death penalty defendant was compiled based on 84 offenders for whom the death penalty was requested between 1970 and 2000. Second, the costs of 28 death penalty trials were compared with the costs of 18 trials where the most serious sentencing option was LWOP. These trials occurred between 1993, when Criminal Rule 24 was implemented, and 2000.

A "typical" death row offender is sentenced at age 30 and executed within 10.5 years. By contrast, LWOP offenders remain in Level 4 facilities for 30 to 50 years, depending on the offender's age at sentencing, sex, and race. The present value cost for a "typical" offender tried in a death penalty case and executed after receiving Rule 24 representation exceeds by 21.15% the cost for a trial where the most serious sentence is LWOP and for housing the offender in a Level 4 facility until the offender died of natural causes 47 years later.

The analysis above does not take into account the costs to the system when a death row offender's sentence is reversed. Taking these costs into account and applying them to the 84 offenders for whom the death penalty was requested between 1970 and 2000, death penalty costs exceed LWOP costs by between 34% and 37%.

VI. Statutory changes: On whether Indiana should consider changing its capital sentencing statute, the Commission found that judicial override of a jury's sentencing recommendation should be eliminated, and that the defendant personally killed, intended to kill, or intended that a killing occur should be added. The issues of

reducing statutory aggravator voluminosity and increasing the minimum age for capital sentence eligibility were discussed, with no consensus reached.

**THE APPLICATION OF
INDIANA'S CAPITAL SENTENCING LAW
THE INDIANA CRIMINAL LAW STUDY COMMISSION'S REPORT
TO THE GOVERNOR AND THE LEGISLATURE**

January 10, 2002

Reporter: Kathryn Janeway

Introduction

In January 2000 Illinois Governor George Ryan imposed an execution moratorium pending repair of capital case procedural problems brought to light after Illinois' 13th exoneration of a capital inmate during the same time period that the state executed 12 people.¹ Governor Ryan formed a special commission to scrutinize the system and recommend reforms,² and an Illinois Supreme Court committee studied the issue and issued its own recommendations.³ With newer, more sophisticated DNA technology and evolving judicial interpretation of standards of review producing further exonerations in other parts of the country, various states and organizations, including Nebraska, Arizona, North Carolina, Texas, and the American Bar Association initiated

¹ Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, NEW YORK TIMES, Feb. 1, 2000, at A1.

² A bipartisan committee led by Republican state Rep. Jim Durkin studied the problem for a year and recommended reforms that include requiring pre-trial screening of all jailhouse informant testimony, automatic new trials in cases where prosecutors knowingly withhold evidence useful to the defense, and pre-trial depositions of certain witnesses.

³ See *Findings and Recommendations of the Special Supreme Court Committee on Capital Cases*, Hon. Thomas R. Fitzgerald, Chairman, October 28, 1999, and see *Special Supreme Court Committee on Capital Cases - Supplemental Findings and Recommendations*, October 2000.

reviews of their capital case procedures,⁴ and still other states are examining proposed reforms.⁵

On the federal level, in February 2000, Senator Patrick Leahy (D-VT), along with Republican and Democratic co-sponsors in the Senate and House, called for the passage of The Innocence Protection Act to ensure access to DNA testing and better representation for defendants facing a capital sentence. Other provisions include compensation for wrongly convicted inmates released from death row and the obligation to instruct jurors of the possible sentencing option of life without parole, where applicable.

Indiana has rules governing quality of counsel for defendants facing a capital sentence,⁶ and Indiana law already requires capital juries to be instructed of the option of life imprisonment without parole.⁷ Indiana has not had a capital sentence reversed due to new DNA evidence because Indiana has long had provisions for DNA testing.⁸ Nevertheless, Indiana Governor Frank O'Bannon asked the Indiana Criminal Law Study Commission⁹ to review Indiana's application of its capital sentencing law in light of the

⁴ See, e.g., *Final Report: The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999); A Legal and Empirical Analysis*, David C. Baldus, George Woodworth, Gary L. Young, Aaron M. Christ, July 25, 2001; *Capital Case Commission Interim Report*, Office of Attorney General Janet Napolitano, August 9, 2001; *Race and the Death Penalty In North Carolina, An Empirical Analysis: 1993-1997*, Isaac Unah and John Charles Boger, April 16, 2001; *A State of Denial: Texas Justice and the Death Penalty*, Texas Defender Service, October 16, 2000; and American Bar Association, Section of Individual Rights and Responsibilities, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*, June 2001.

⁵ Editorial, *Fixing the Death Penalty*, CHICAGO TRIBUNE, 1A, Dec. 29, 2000.

⁶ See Indiana Criminal Rule 24.

⁷ See IC 35-50-2-9(d) and (e).

⁸ See, e.g., Indiana Criminal Rule 24(C)(2) and general caselaw.

⁹ The Indiana Criminal Law Study Commission was established by Executive Order 8-81 and most recently reestablished and continued by Executive Order 97-21. "[T]he Commission shall have as its major purpose to study and propose revisions in criminal procedure and to monitor the Criminal Code, Juvenile Code and Corrections Code. . . . [and] shall draft recommendations for

problems surfacing in other states and the fact that the administration of this law had not been reviewed since its adoption in 1977; the Legislative Council of the Indiana General Assembly made the same request.¹⁰

The Commission reviewed Indiana's capital sentencing statute and procedures throughout each stage of application, focussing particularly on the following issues raised by Governor O'Bannon:

I. Whether safeguards are in place to ensure that an innocent person is not executed;

II. Whether our special rules requiring definitively trained capital defense counsel are working to ensure that a capital defendant's legal representation is properly qualified;

III. Whether the review procedures in place in Indiana and in our federal Seventh Circuit appellate courts result in a full and fair review of capital cases;

IV. Whether Indiana imposes capital sentencing in a race neutral manner;

V. How the cost of a death penalty case compares to that of a case where the charge and conviction is life without parole; and

VI. Whether Indiana should consider any changes in its capital sentencing statute.¹¹

legislative or court approval which would insure just and efficient operation of the criminal justice system."

¹⁰ Governor Frank O'Bannon letter to Commission chairman Senator William E. Alexa, March 9, 2000; Legislative Council Resolution (LCR)-00-1 § 2 (13) May 25, 2000.

¹¹ "Unlike Governor Ryan, Governor O'Bannon did not impose a moratorium on executions. The best reason for withholding such action was the existence, for nearly ten years now, of the Indiana Public Defender Commission and Supreme Court Criminal Rule 24." Randall T. Shepard, *Building Indiana's Legal Profession*, __ IND. L. REV. (2001) (footnotes omitted). Randall T. Shepard is Chief Justice of the Supreme Court of Indiana, J.D., 1972, Yale University; B.A., 1969, Princeton University.

"... [O]ur leadership on providing capable counsel to defendants in capital cases has attracted wide attention. The decisions of all three branches of Indiana government over the last decade created a model for indigent death penalty representation that just in the last year has been the subject of inquiry by legislators, commissions, and judges in Illinois, Michigan, New York, Mississippi, Texas, and a host of other places." *Id.*

The Commission conducted its review by examining raw data, reports, papers, articles, studies, publications, and other states' capital sentencing laws and procedures; by taking testimony from seasoned practitioners regarding their experiences, views, and advice; by consultation among Commission members, given member expertise in criminal law; and by asking for public input regarding Indiana's law and its application. Commission members heard presentations by and held discussions with individuals holding varied positions within the criminal justice system, including those of capital trial judge, capital trial counsel (both defense and prosecution), capital appellate counsel (both defense and state), criminal law professor, public defender commissioner, crime lab technician, juror, data researcher, and citizen. Commission members also reviewed the cases and procedural history of each convict on Indiana's death row.

I.

Whether safeguards are in place to ensure that an innocent person is not executed.

*"Today, as yesterday, the chance of error remains. Tomorrow another expert testimony will declare the innocence of some [defendant] or other. But [the executed] will be dead, scientifically dead, and the science that claims to prove innocence as well as guilt has not yet reached the point of resuscitating those it kills"*¹²

Background

Violent criminals have broken a trust with society by partaking in its privileges without obeying its laws enacted for the well-being of all. Society expresses its utter intolerance of the most abhorrent of violent crimes -- the aggravated, intentional extinguishing of an innocent human being -- by imposing its most severe punishment.¹³ Refraining from imposing the most severe punishment for the worst crime denies the validity of the social contract by which citizens have agreed to live together as a community and engage in lawful behavior.¹⁴

Yet despite best efforts to administer a fair justice, human beings and their systems are fallible, and one may reasonably assume that the worst sentence, as with

¹² French existentialist philosopher Albert Camus (1913-1960) in his 1957 essay, "Reflections on the Guillotine," published in a collection of Camus' essays, *Resistance, Rebellion, and Death* (1961).

¹³ While some criminals prefer death to a life in prison, others agree with United States Supreme Court Justice William J. Brennan, Jr., who called the death penalty "the most severe and awesome penalty known to our law." *Parker v. North Carolina*, 397 U.S. 790, 809 (1970). The majority of Americans, through their legislators, continue to define our strongest punishment as capital punishment. In 1979, 32 states had the death penalty; in 2002, 38 states have the death penalty. The remaining states define life in prison without parole, life in prison, or a large term of years in prison as their strongest punishment.

¹⁴ For further discussion of this principle, see generally, e.g., German philosopher Immanuel Kant (1724-1804), *The Metaphysical Elements of Justice* (1797).

any other sentence, may "inevitably be inflicted upon innocent men."¹⁵ In recent years, due to improved sophistication of DNA technology, increased efforts to re-investigate capital convictions,¹⁶ and our evolving capital jurisprudence, several death row inmates across the country have had their convictions overturned after reviewing courts found the legal standard of "guilty beyond a reasonable doubt" unmet.

Although some well-meaning journalists and capital punishment opponents have characterized these reversals as the formerly convicted now having been proven "innocent," this misstates the situation. It is difficult to say exactly how many reversals involved defendants who were actually innocent. It is equally difficult to say how many reversals involved defendants who were actually guilty. What can be said with certainty is that reviewing courts, utilizing more sophisticated and evolving standards of both science and jurisprudence, have reversed capital cases where the reviewing court's full confidence in the conviction has been undermined to some extent or the proceedings were found to be unfair in some way. For example, post-trial DNA testing showing that semen evidence belonged to the rape-murder victim's husband, not the defendant, does not prove that the defendant did *not* rape and murder the victim. Few convictions are the result of a single piece of evidence. However, if a reviewing court finds that the semen played a strong part in proof of guilt, the remaining evidence, depending on its strength, may or may not be sufficient to maintain the court's full confidence under the law in the defendant's conviction. The societal benefit of the reasonable doubt standard

¹⁵ United States Supreme Court Justice Thurgood Marshall, writing in *Furman v. Georgia*, 408 U.S. 238, 290, *reh'g denied*, 409 U.S. 902 (1972).

¹⁶ Such efforts have been undertaken not only by legal defense teams but also by other interested citizens. For example in some cases students, in others, journalists, have been responsible for uncovering evidence resulting in conviction reversals. Investigations conducted by students of Northwestern University's Medill School of Journalism uncovered evidence that resulted in several of the recently overturned convictions in Illinois.

in criminal law is protection of an innocent defendant; the cost of protecting the innocent is that sometimes the guilty will escape justice.

Society's intolerance for the aggravated murder of an innocent person is closely seconded by its intolerance for punishing the wrong person for that murder. Punishment of the innocent played an important role in reforming the English system of criminal justice upon which our own system is based.¹⁷ In seventeenth-century England, many innocent people were tried and condemned to traitors' deaths in the Popish Plot cases.¹⁸ The Popish Plot cases played a role in bringing about the criminal defendant's right to counsel.¹⁹

In eighteenth-century England, an even greater number of innocent people were executed on the basis of the false testimony of witnesses who hoped for a reward from the monarch.²⁰ The realization that reward-induced false testimony formed the basis of

¹⁷ See Welsh S. White, *The Death Penalty in the Nineties: An Examination of the Modern System of Capital Punishment*, The University of Michigan Press, Ann Arbor, 2000, p. 38, citing Langbein, *The Criminal Trial Before Lawyers*, 45 U. CHI. L. REV. 263, 309 (1978).

¹⁸ Anglican priest Oates Titus (1649–1705) and his accomplice Israel Tonge invented the story of the Popish Plot of 1678. Mr. Oates, who had been briefly a convert to Roman Catholicism, claimed that there was a Jesuit-guided plan to assassinate Charles II in order to hasten the succession of the Catholic James, duke of York. The story was completely fabricated. The unexplained death of the judge to whom Tonge and Oates first told their story was attributed without evidence to the Catholics, and three innocent men were hanged for it. A frenzy of anti-Catholic hatred swept through England, resulting in the judicial execution of many Roman Catholic citizens and in the arrest and torture of many others. "Oates, Titus." *The Columbia Encyclopedia*, 6th ed. New York: Columbia University Press, 2001, found at www.bartleby.com/65/ [site visited August 7, 2001].

¹⁹ White, *The Death Penalty in the Nineties*, p. 38, citing Langbein, *The Criminal Trial Before Lawyers*, 45 U. CHI. L. REV. at 309 n. 57 (supra, note 6).

²⁰ Condoned by common law, the practice was called the "Crown witness system." In return for testimony against others, one witness, the "crown witness," would not be indicted at all. A second witness would be charged and would agree to plead guilty in return for a completely suspended sentence *after his testimony resulted in convictions of the remainder of those indicted*. This was a very motivated witness, for if his testimony failed to convict, his sentence was not suspended and instead he received the maximum sentence upon his guilty plea (which included the possibility of execution). See Langbein, *Shaping the Eighteenth Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 108-14 (1983).

the executions of innocent citizens brought about changes in law enforcement methods and rules regarding evidence admissibility.²¹

Even today, a not uncommon feature of a criminal case involves the testimony of incarcerated informants or "jailhouse snitches" -- inmates who swear in court that the defendant confessed to them. For people in prison or jail, such testimony can be a powerful bargaining chip because in exchange for such testimony, the prosecution will often reduce the time they are serving, dismiss or reduce charges pending against them, or agree to seek a reduced sentence upon conviction. Because the possibility of leniency is a strong inducement to lie, the prosecutor is required to tell the defense, who will then tell the jury, about the deal. With that knowledge the jury can weigh the credibility of the testimony. A prosecutor who fails to disclose such a deal commits misconduct, which can be grounds for the granting of a new trial.

Other causes of wrongful conviction include ineffective assistance of trial counsel, mistaken eye-witness identification, evidence wrongfully suppressed by the prosecution, false confessions, and questionable scientific evidence.²²

Neither our federal nor our state constitution requires more elaborate criminal proceedings for those charged with capital rather than non-capital crimes. But given the finality of the death penalty, Indiana has adopted more stringent rules and procedures, a sort of "super due process," for capital cases in an effort to erect sufficient safeguards against mistakenly punishing the innocent.

Of course, protecting an innocent defendant is not our only concern -- protecting innocent citizens from criminal harm remains the basic purpose of our criminal justice system.²³ When an innocent defendant is wrongfully convicted, the truly guilty party

²¹ See *Id.* at 114 n. 58.

²² See, e.g., Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 JOURNAL OF LAW & CONTEMPORARY PROBLEMS 469 (1998).

escapes responsibility, escapes justice, and remains a proven danger on the loose.²⁴

²³ This tension is reflected in the debate between capital punishment opponents and proponents. Opponents point to the fact that an innocent person may be executed. See, e.g., *Capital Punishment: The Ultimate Injustice*, http://d.witmer.tripod.com/Death_Pentalty.html [site visited August 6, 2001]. Proponents point to the fact that over 12,000 innocent Americans are murdered each year by released and paroled criminals, and that to eliminate capital punishment on the risk of an innocent's execution is to "to treat enormous human death tolls as though they were less tragic than smaller ones." See Wesley Lowe's *Pro-Death Penalty Homepage*, <http://www.geocities.com/Area51/Capsule/2698/abdic.html> [site visited August 6, 2001].

²⁴ Timothy McVeigh, who admitted his guilt, was executed this year and was the first person executed by the federal government since 1963, for the bombing of the federal government building in Oklahoma City that took the lives of Lucio Aleman Jr., 33, Teresa Alexander, 33, Richard A. Allen, 46, Ted L. Allen, 48, Baylee Almon, 1, Diane E. Hollingsworth Althouse, 45, Rebecca Anderson, 37, Pamela Argo, 36, Sandra "Sandy" Avery, 34, Peter Avillanoza, 56, Calvin Battle, 62, Peola Battle, 56, Danielle Bell, 15 months, Oleta Biddy, 54, Shelly Turner Bland, 25, Andrea Blanton, 33, Olen B. Bloomer, 61, Army Sgt. 1st Class Lola Rene Bolden, 40, James E. Boles, 50, Mark A. Bolte, 28, Casandra Booker, 25, Carol Bowers, 53, Peachlyn Bradley, 3, Woodrow Brady, 41, Cynthia Campbell Brown, 26, Paul G. Broxterman, 42, Gabreon Bruce, 3 months, Kimberly Ruth Burgess, 29, David N. Burkett, 47, Donald E. Burns, 63, Karen Gist Carr, 32, Michael J. Carrillo, 44, Rina Chafey, 35, Zackery Chavez, 3, Sharon Chestnut, 47, Robert Chipman, 51, Kimberly K. Clark, 39, Margaret L. "Peggy" Clark, 42, Antonio A. Cooper, Jr., 6 months, Anthony Christopher Cooper II, 2, Dana L. Brown Cooper, 24, Harley Cottingham Jr., 46, Kim R. Cousins, 33, Aaron Coverdale, 5 1/2, Elijah Coverdale, 2 1/2, Jaci Coyne, 14 months, Katherine Cregan, 60, Richard Cummins, 55, Steven Curry, 44, Brenda Daniels, 42, Sgt Benjamin L. Davis, 29, Diana Lynn Day, 38, Peter DeMaster, 44, Castine Deveroux, 49, Shelia Driver, 28, Taylor Eaves, 8 months, Ashley Eckles, 4, Susan Ferrell, Carrol "Chip" Fields, Katherine Ann Finley, 44, Judy J. Fisher, 45, Linda Florence, 43, Donald Fritzler, 64, Mary Anne Fritzler, 57, Tevin Garrett, 16 months, Laura Jane Garrison, 61, Jamie Genzer, 32, Margaret Goodson, 54, Kevin Lee Gottshall, 6 months, Ethel Louise Griffin, 55, Collen Guiles, 59, Marine Capt Randolph Guzman, 28, Cheryl Hammons, 44, Ronald Harding, 55, Thomas Hawthorne, 52, Doris Adele Higginbottom, 44, Anita C. Hightower, 27, Thompson E. "Gene" Hodges, 54, Peggy Louise Holland, 37, Linda Coleen Housley, 53, George M. Howard, 45, Wanda Howell, Robbin A. Huff, 37, Anna Jean Hurlburt, 67, Charles Hurlburt, 73, Paul D. Ice 42, Christi Y. Jenkins, 32, Norma Jean Johnson, 62, Raymond L. Johnson, 59, Larry J. Jones, 46, Alvin Justes, 54, Blake R. Kennedy, 1 1/2, Carole Khalil, 50, Valerie Koelsch, 33, Carolyn A. Kreymborg, 57, Teresa L. Lauderdale, 41, Catherine Leinen, 47, Carrie Lenz, 26, Donald R. Leonard, 50, Airman 1st Class Lakesha R. Levy, 21, Dominique London, 2, Rheta Long, 60, Michael Loudenslager, 48, Aurelia "Donna" Luster, 43, Robert Luster, 45, Mickey Maroney, 50, James K. Martin, 34, Gilberto Martinez, 35, Tresia Mathes-Worton, 28, James Anthony McCarthy, 53, Kenneth McCullough, 36, Betsy J. Beebe McGonnell, 47, Linda G. McKinney, 47, Airman 1st Class Catney J. Koch McRaven, 19, Claude Medearis, 41, Claudette Meek, 43, Frankie Ann Merrell, 23, Derwin Miller, 27, Eula Leigh Mitchell, 64, John C. Moss III, 50, Patricia Nix, 47, Jerry Lee Parker, 45, Jill Randolph, 27, Michelle Ann Reeder, 33, Terry Smith Rees, 41, Mary Leasure Rentie, 39, Antonio Reyes, 55, Kathryn Ridley, 24, Trudy Rigney, 31, Claudine Ritter, 48, Christy Rosas, 22, Sonja Sanders, 27, Lanny L. Scoggins, 46, Kathy L. Seidl, 39, Leora L. Sells, 57, Karan D. Shepherd, 27, Chase Smith, 3, Colton Smith, 2, Army Sgt. 1st Class Victoria Sohn, 36, John T. Stewart, 51, Dolores M. Stratton, 51, Emilio Tapia, 50, Victoria Texter, 37, Charlotte A. Thomas, 43, Michael Thompson, 47, Virginia Thompson, 56, Kayla M. Titsworth, 3 1/2, Ricky L. Tomlin, 46, LaRue Treanor, 55, Luther Treanor, 61, Larry L. Turner, 42, Jules A. Valdez, 51, John K. Van Ess, 67, Johnny A. Wade, 42, David J. Walker, 54, Robert N. Walker, 52, Wanda L. Watkins, 49, Michael Weaver, 54, Julie Welch, 23, Robert Westberry, 57, Alan Whicher, 40, JoAnn Whittenberg, 35,

Indiana Safeguards to Protect the Innocent

Three Example Cases

Below are three example cases demonstrating Indiana safeguards at work. The first two cases entail conviction reversals where the defendants were likely actually innocent. The third case entails a conviction reversal where the defendant was likely actually guilty. In each of these three cases, the reviewing court reversed after finding something unfair about each defendant's trial. But in the first two cases, those of Larry Hicks and Charles Smith, each defendant claimed innocence and proceeded to a new trial. Conversely, in the third case, Perry S. Miller admitted his guilt. Assuming that Messrs. Hicks and Smith are in fact innocent, their cases are examples of how certain safeguards work to protect the innocent. Assuming that Mr. Miller is in fact guilty, his case is an example of how sometimes the cost of those safeguards lies in the guilty possibly escaping justice.

Larry Hicks²⁵

Larry Hicks' 1978 convictions and capital sentence for the stabbing murders of 28 year old Norton Miller and 26 year old Stephen Crosby were set aside by the original trial judge upon a Motion to Correct Errors on the basis that Mr. Hicks' had not been competent to stand trial. At his 1980 retrial he was found not guilty.

In 1978 Mr. Hicks had attended a party with the two victims at the Gary, Indiana, apartment of two women, who later testified at trial that they had seen the three men arguing and Mr. Hicks brandishing a knife. The victims were found stabbed to death

Frances A. Williams, 48, Scott Williams, 24, William Stephen Williams, 42, Clarence Wilson, Sr., 49, Ronota A. Woodbridge, 31, and John A. Youngblood.

²⁵ Case summary mainly taken from that provided to the Criminal Law Study Commission by Paula Sites of the Indiana Public Defender Council.

outside the apartment building. No physical evidence was found and Mr. Hicks consistently denied committing the stabbings. The prosecution's evidence consisted mostly of the testimony of the two women.

Mr. Hicks' lawyer presented no evidence on Mr. Hicks' behalf at trial. The lawyer had not known that Mr. Hicks faced the death penalty until about a week before the trial. The lawyer had not interviewed the two women set to testify against Mr. Hicks, nor had he interviewed the arresting officer or potential alibi or character witnesses.

The jury found Mr. Hicks guilty, but could not agree as to a capital sentence. The judge then imposed a capital sentence. Two weeks before his scheduled execution, Mr. Hicks' lawyer had still not initiated an appeal. Two other lawyers discovered this while visiting a client at the prison where Mr. Hicks was incarcerated, agreed to represent Mr. Hicks *pro bono*, and filed a Motion to Correct Error alleging ineffective assistance of counsel and Mr. Hicks' incompetence to have stood trial. The judge ordered a new trial based on the latter grounds.²⁶

The lawyers appealed to the public for contributions to aid in Mr. Hicks' defense.²⁷ The Playboy Foundation granted money to the lawyers to pay for an investigator and other expenses.²⁸ The team interviewed the two women who had testified against Mr. Hicks at his first trial. Both recanted their testimony and stated that they had not seen Mr. Hicks with a knife. One said that she had lied at the first trial because she had been afraid of the real killer, whom she identified.

²⁶ See Judge James C. Kimbrough's February 1980 "Findings and Order" on Larry Hicks' Petition for Postconviction Relief.

²⁷ "Man On Death Row Is Lawyer's Crusade," Indianapolis Star, November 29, 1979, p. A1.

²⁸ For Playboy's summary of the facts of the case, see "The Man Who 'Didn't Do It,'" *Playboy Casebook*, Playboy, _____, 19__.

The women so testified at Mr. Hicks' new trial, where Mr. Hicks also testified for the first time. The witnesses in whose company Mr. Hicks had been during the time of the killings testified to that fact. The jury acquitted Mr. Hicks.

Charles Smith²⁹

Charles Smith's 1983 conviction for the shooting murder of 20 year old Carmine Zink was reversed on appeal of the denial of postconviction relief on the basis of ineffective assistance of counsel. At his 1991 retrial he was found not guilty.

In late 1982 Ms. Zink was gunned down and robbed in the parking lot of a Fort Wayne, Indiana, restaurant where she was headed to meet co-workers for a Christmas party. Two cousins were arrested and after numerous interrogations and plea negotiations, both named Charles Smith as the trigger man. Mr. Smith was arrested and charged with the murder.

For his Fort Wayne trial, Mr. Smith was represented by an Indianapolis lawyer with no capital trial experience who was retained by Mr. Smith's family for less than \$10,000.³⁰ The attorney did not investigate the case, took no depositions, interviewed no witnesses, and did not investigate or prepare any mitigation evidence for a possible penalty phase. Mr. Smith was convicted and received a capital sentence.

Mr. Smith's conviction and sentence were affirmed on direct appeal and the United States Supreme Court denied his petition for certiorari. Attorneys from the office of the Public Defender represented Mr. Smith for postconviction proceedings. These attorneys investigated the case and introduced at the postconviction hearing evidence from more than one source that the cousins had framed Mr. Smith and that Mr. Smith had an alibi that was never introduced at trial. Nevertheless, the postconviction court

²⁹ Case summary mainly taken from that provided to the Criminal Law Study Commission by Paula Sites of the Indiana Public Defender Council.

³⁰ Fort Wayne is located approximately 120 miles from Indianapolis.

denied Mr. Smith's petition for relief. However, the Indiana Supreme Court unanimously reversed that denial on the basis of ineffective assistance of counsel.

A lawyer represented Mr. Smith *pro bono* at retrial, and the incidental expenses of the trial were borne by a group of Fort Wayne supporters who were convinced of Mr. Smith's innocence. After a two-week trial, Mr. Smith was found not guilty. He was released from prison after nine years on death row, at one point coming within three days of execution.

In contrast to the cases of Messrs. Hicks and Smith, a recent example of a reversed conviction that had a much different result is that of Perry S. Miller, whose capital conviction the Seventh Circuit Court of Appeals reversed in July 2001.

*Perry S. Miller*³¹

In 1991, a jury found 43 year old Perry S. Miller guilty of criminal deviate conduct, criminal confinement, rape, conspiracy to commit murder, and the murder of 19 year old convenience store clerk Christel Helmchen. The evidence produced at trial showed that Mr. Miller, his 19 year old stepson Billy Harmon, and his stepson's 16 year old friend Rodney Wood, planned to rob the White Hen Pantry in Valparaiso, Indiana, and "have fun with," rape and kill its clerk.

Mr. Miller went to a local hardware store and bought a box of .12 gauge shotgun shells. When the store clerk asked if Mr. Miller planned to go deer hunting, he replied, "Sort of, a 115 pound one." A few nights later, the three men departed for the White Hen Pantry taking with them a .38 caliber pistol, a sawed-off .12 gauge shotgun, a .12

³¹ Case summary taken from the following sources:

(1) *Miller v. State*, 623 N.E.2d 403 (Ind. 1993) (direct appeal);
(2) *Miller v. State*, 702 N.E.2d 1053 (Ind. 1998) (appeal from denial of postconviction relief);
(3) *Miller v. Anderson*, 255 F.3d 455 (7th Cir. 2001) (appeal from denial of habeas corpus relief);
(4) Steve Stewart, Indiana Prosecuting Attorneys Council, *Indiana Death Row 2001*, June 1, 2001, p. 212-13.

gauge pump shotgun, a spool of nylon rope, and a sleeve torn from a flannel shirt for the purpose of gagging the clerk.

The men robbed Ms. Helmchen at gunpoint, then gagged her with the flannel sleeve, tied her, and dragged her to a construction site's partially erected building. Mr. Miller fondled Ms. Helmchen, threw her to the floor, and directed his accomplices to rape her vaginally while he watched, which they did. Mr. Miller then directed his accomplices to tie Ms. Helmchen upright to a wall, whereupon he beat her with his fists and with a two-by-four and stabbed her thigh and breast with an ice pick. He then directed his accomplices to rape her rectally with a tire iron while he watched, which they did. When the men were finished, they shot Ms. Helmchen in the head with a shotgun.

Ms. Helmchen's body was found at roadside, her checkbook was found in Mr. Miller's driveway, numerous sawed-off shotguns were found in the Miller household, the flannel shirt sans the sleeve used to gag Ms. Helmschen was found in the car the accomplices drove, and the accomplices admitted to living with Mr. Miller. The accomplices testified at trial as to Mr. Miller's conduct during the crime.

In an attempt to counteract the damaging evidence against their client, Mr. Miller's attorneys introduced, along with other evidence, the testimony of an expert witness, a psychologist, who had interviewed and performed a battery of psychiatric tests on Mr. Miller. The psychologist testified as to his following opinion:

1. Miller had no severe psychological or psychiatric syndromes, and no severe or major personality disorders.
2. Miller did not exhibit cracks in his thought processes, although he did exhibit some mild depression.
3. Miller demonstrated some sensitivity to art.
4. Miller's personality profile did not display aggressive or sadistic tendencies. Sadistic or aggressive tendencies are lifelong patterns unlikely to change or develop over time.

To rebut the psychologist's testimony, the prosecutor called as witnesses two women, each of whom testified that Mr. Miller had raped her and had acted with extreme violence and aggression towards them.³²

The first woman testified that Mr. Miller had raped her and beaten her almost to death. Although charges were filed against Mr. Miller in this incident, he was never brought to trial.

The second woman was the victim of a kidnapping and rape for which Mr. Miller previously had been convicted and sentenced to life in prison. She testified that Mr. Miller entered her car, pointed a gun at her, made her drive to a secluded location, tied her up, jerked her to the ground, tried to force her to perform fellatio on him, and hit her and knocked her flat to the ground after she bit him. He then tied her spread-eagled to a tree, slit her skirt open with a knife, pulled her back down to the ground, raped her, and threatened to kill her if she told anyone. Mr. Miller received a life sentence for kidnapping, rape, and sodomy, and was out on parole when Ms. Helmchen was tortured and murdered.³³

A jury found Mr. Miller guilty of the crimes against Ms. Helmchen, and his convictions and sentence were affirmed on direct appeal, the trial court denied postconviction relief, that denial was affirmed on appeal, and the federal district court

³² Usually the prosecution is not allowed to present evidence of a defendant's past bad acts to prove the charged crime because the prejudice against the defendant that such evidence creates is likely to outweigh the evidence's probative value in proving the present charges. See Ind. Evid. Rule 404(b). The idea is that behavior in the past is not necessarily proof of behavior in the present, and it might be difficult for a jury not to pre-judge a defendant by his past. An exception to the proscription against presenting a defendant's past bad acts arises when "the door is opened" by the defense making a contrary, material assertion, here, that Mr. Miller had no sadistic tendencies. When that happens, the prosecution is usually allowed to rebut the assertion. Sometimes there is no or little evidence available to do so. In Mr. Miller's case, the prosecutor had rebuttal evidence.

³³ As opposed to our current "life without parole" sentencing provision, where a person with that sentence would remain incarcerated until his death, a "life" sentence under former code provisions was an indeterminate sentence allowing for the possibility of parole.

denied habeas corpus relief. On his case's sixth appearance before a court, on appeal from the district court's habeas denial, the Seventh Circuit Court of Appeals reversed Mr. Miller's conviction and sentence, finding that defense counsel's decision to have the psychologist testify that Mr. Miller was incapable of the kind of violence committed against Ms. Helmchen constituted ineffective assistance of counsel, because that testimony opened the door for prosecutors to show on cross-examination that Mr. Miller had exhibited such behavior in the past and indeed had previous convictions for kidnapping, rape, and sodomy.³⁴ The Court ordered a new trial to be held within 120 days or else the release of Mr. Miller. Mr. Miller chose to plead guilty in return for a sentence of 138 years imprisonment.³⁵

The cases of Messrs. Hicks, Smith, and Miller illustrate in varying ways and degrees the workings of several of the safeguards that are in place to protect an innocent criminal defendant from wrongful execution, safeguards that sometimes work so well that guilty criminals can potentially benefit from them, too, as in the close call of Mr. Miller's potential release. That said, systems are not perfect. Initial safeguards sometimes fail to work well on the front end, as in the Hicks and Smith cases, resulting in lost years behind bars, before later properly-working safeguards do their jobs of halting mistakes and preventing wrongful executions.

Indiana has a list of safeguards, many of which are briefly outlined below. Effective counsel and the review process comprise the lion's share in terms of the scope and scale of afforded protection. On the back end of a capital conviction and sentence, the multi-stage review process is the most important safeguard in protecting an innocent

³⁴ The Seventh Circuit also found that defense counsel should have obtained a hair analysis expert to challenge the prosecution's evidence that a pubic hair found on Ms. Helmchen's body almost certainly came from Mr. Miller.

³⁵ "LaPorte man pleads guilty to avoid death sentence," Associated Press, Indianapolis Star, found at <http://www.starnews.com> [visited August 9, 2001].

defendant. On the front end, quality of counsel, more than the heinousness of the crime and more than the criminal history of the offender, often determines who receives a capital sentence in the first place, and who gets mistakes reversed as they move through the review process.³⁶

A. Effective Counsel

Capital litigation is a highly specialized, legally complex field, a “minefield for the unwary Adequate preparation requires not only a grasp of rapidly changing substantive and procedural doctrine, but also labor-intensive and time-consuming factual investigation.”³⁷ Inadequate legal representation is generally agreed to comprise the most serious threat of executing the innocent.³⁸ Twenty-five years ago, United States Supreme Court Justice Thurgood Marshal worried that capital defendants might be wrongfully executed because of poor representation resulting from counsel’s caseload and the defendant’s inability to afford adequate representation.³⁹ The “severity and irrevocability of the sanction at stake” required that principles of adequate legal representation “be applied especially stringently in capital sentencing proceedings.”⁴⁰

³⁶ American Bar Association, Section of Individual Rights and Responsibilities, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*, June 2001.

³⁷ The Constitution Project, *Mandatory Justice: Eighteen Reforms to the Death Penalty*, pre-publication version, updated July 3, 2001, p. 3.

³⁸ “The lack of adequate counsel to represent capital defendants is likely the gravest of the problems that render the death penalty, as currently administered, arbitrary, unfair, and fraught with serious error -- including the real possibility of executing an innocent person. . . . Indeed . . . the quality of capital defense counsel seems to be the most important factor in predicting who is sentenced to die -- far more important than the nature of the crime or the character of the accused.” The Constitution Project, *Mandatory Justice*, p.3. See also, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE LAW JOURNAL 835 (1994); and James S. Liebman, *The Overproduction of Death*, 100 COLUMBIA LAW REVIEW 2030 (2000).

³⁹ *Strickland v. Washington*, 466 U.S. 668, 687, 708, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

⁴⁰ *Strickland*, 466 U.S. at 716, 708.

To comply with a capital defendant's constitutional right to effective counsel, Indiana has developed an integrated complement of capital defense counsel guidelines and resources, including Criminal Rule 24, the Office of the Public Defender,⁴¹ the Public Defender Council, the Public Defender Commission, and the Public Defense Fund. This report's Section II., "Whether our special rules requiring definitively trained capital defense counsel are working to ensure that a capital defendant's legal representation is properly qualified," addresses Indiana defense counsel standards in detail. In general, regarding Rule 24, our Supreme Court has summarized as follows:

[A] capital defendant in this state also receives the protection of Indiana Criminal Rule 24. We are now in the tenth year of the operation of Rule 24. It creates minimum standards for the criminal litigation experience, specialized training, compensation, and caseload of lawyers appointed in capital cases. Both prosecutors and defense counsel agree that "Rule 24 ha[s] led to improved representation by defense lawyers in capital cases." [citation omitted] "[A] death penalty verdict returned [since the advent of Rule 24 is] more likely to be sustained on appeal, and the appellate court [is] less apt to find that defense counsel was ineffective."⁴²

As evidenced by the quality of capital defense representation in Indiana (discussed in Section II.), Rule 24's compensation rate of \$90/hour (recently raised from \$70/hour) apparently is sufficient to attract excellence in defense practice.⁴³ Of course, adequate legal representation includes all the support services that go along with

⁴¹ Some states, e.g., Alabama, Mississippi, and Texas, have no public defender and no other central system for quality control of appointed counsel.

⁴² *Ben-Yisrayl f/k/a Christopher Peterson, v. State*, 729 NE2d 102, 106 (Ind. 2000), quoting Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and Its Implications for the Nation*, 29 Ind. L.Rev. 495, 509 (1996).

⁴³ Noting that Alabama's appointed capital defense counsel are paid \$20-40/hour with a maximum cap of \$2,000 per case, Tennessee counsel are paid \$20-30/hour, and Mississippi has a maximum cap of \$1,000 per case, The Constitution Project recently issued as one of its recommendations that "Capital defense lawyers should be adequately compensated." The Constitution Project, *Mandatory Justice*, p.3. California and federal appointed capital defense counsel are paid \$225/hour and \$175/hour, respectively.

developing and presenting the best defense.⁴⁴ Pursuant to Rule 24, Indiana capital defense counsel at trial and on direct appeal have no express limitations on support services such as paralegals, investigators, experts, etc., have the ability to obtain those extra services *ex parte*, and have no limitation on the number of hours that defense counsel can charge for a death penalty case. At the postconviction phase, the same level of services is made available to the petitioner through the office of the Public Defender.⁴⁵

B. Review Process

Indiana's review process is discussed in detail in this report's Section III., "Whether the review procedures in place in Indiana and in our Seventh Circuit federal appellate courts result in a full and fair review of capital cases."

Briefly here, Indiana's process for review of a capital conviction and sentence consists of the following four basic avenues: state direct appeal, trial court postconviction proceedings, federal habeas review, and petition for executive clemency. Preliminarily, a motion to correct errors may be filed with the original trial court, usually within 30 days after the trial. It was a belated motion to correct errors that resulted in the reversal of Mr. Hicks' capital conviction and sentence. Rule 24 governs counsel qualification standards and provision of services and incidentals on behalf of the defendant.

The first avenue of review is direct appeal. All capital sentences undergo automatic direct appeal to the Indiana Supreme Court. If the inmate does not prevail initially, he can move for a rehearing. If the inmate does not prevail at our Supreme Court, he can petition the United States Supreme Court for a writ of certiorari. If

⁴⁴ Recommendation: "[T]he defense should be provided with adequate funding for experts and investigators." The Constitution Project, *Mandatory Justice*, p.3.

⁴⁵ Because there is no constitutional right to counsel after direct appeal, many states do not provide counsel for post-appeal review proceedings. Indiana provides such counsel through its office of the Public Defender.

unsuccessful initially, he can petition for a rehearing with that Court. Rule 24 governs counsel qualification standards and provision of services and incidentals on behalf of the defendant at this level.

Second, the inmate may petition the trial court for postconviction relief ("PCR"). An evidentiary hearing is held. If the inmate does not prevail initially, he can file a motion to correct errors with the trial court. If the inmate does not prevail at the trial court level, he can appeal to the Indiana Supreme Court. If unsuccessful initially there, he can petition for a rehearing. If he does not prevail at our Supreme Court, he can petition the United States Supreme Court for a writ of certiorari. If unsuccessful initially, he can petition for a rehearing. The Public Defender governs counsel qualification standards and provision of services and incidentals on behalf of the inmate at this level. Successive PCR proceedings are available under certain circumstances and by permission of our Supreme Court.

Third, the inmate can petition the federal district court for writ of habeas corpus. An evidentiary hearing is held. If the inmate does not prevail initially, he can file a motion to reconsider. If unsuccessful at the district court level, he can appeal to the Seventh Circuit Court of Appeals. If unsuccessful initially, he can move for rehearing or for rehearing en banc. If he does not prevail at the Seventh Circuit, he can petition the United States Supreme Court for a writ of certiorari. If denied initially, he can petition for rehearing. Successive petitions for habeas review are available under certain circumstances. The federal judge in whose court the petition will be filed appoints and compensates counsel. Usually, the defendant's postconviction lawyers line up habeas counsel and file a notice of intent to file the habeas petition, petition for stay, and request to be appointed counsel. The Federal District Court for the Southern District of Indiana has a local rule governing qualifications for appointment of counsel on a capital habeas

petition.⁴⁶ The Northern District has a committee that oversees counsel qualifications.⁴⁷

Fourth, the inmate can appeal for executive clemency. The inmate files a petition for clemency with the Parole Board, who conducts an investigation and holds a hearing. The Board issues a recommendation to the Governor, who then reviews the case.

Clemency is the last review available. However, even after this last review has been exhausted, newly discovered, material, evidence may provide grounds for a stay of execution and further review.

C. Defense Specialists

A defendant has the right to mitigation specialists, factual investigation specialists, and other experts to aid in his defense. Counties pay for these expenses for an indigent defendant. The state reimburses counties 50% of these costs if the state determines that the county complied with Criminal Rule 24.

D. Expert Litigation Support from Indiana Public Defender Council

The Indiana Public Defender Council provides specialized annual training, a written manual, sample pleadings, and other litigation support materials for attorneys who represent capital charged indigent defendants. A capital litigation support attorney monitors the status of each death penalty request and provides research and technical assistance on request, including assistance in networking with other attorneys who have handled similar issues both inside and outside of Indiana.

E. Right to a Jury

A defendant has the right to have his guilt or innocence determined by a jury of twelve citizens, rather than by one judge. A defendant has the right to have his

⁴⁶ See Local Rule C.R. 6.2.

⁴⁷ See letter from Northern District of Indiana's qualifications committee chairman to Criminal Law Study Commission staff attorney Kathryn Janeway, 2001.

sentence recommended by a jury of twelve citizens, although the judge, "the thirteenth juror," makes the final decision.

F. Change of Venue

A defendant can move to change the venue of his trial from one county to another in order to avoid local bias stemming from, e.g., pre-trial publicity.

G. Jury Sequester

The sequestering of a capital trial jury aids in preventing jury tainting or tampering during trial.

H. Jury Instructions

Sample preliminary and final jury instructions for the penalty phase of a death penalty trial are as follows:⁴⁸

PRELIMINARY INSTRUCTION NO. 1

Under the law of this state, you must presume that that the aggravating factor does not exist. You must continue to presume this throughout the sentencing phase of this trial unless the State proves the aggravating factor as charged beyond a reasonable doubt.

Because the aggravating factor is presumed not to exist, [Defendant] is not required to disprove the aggravating factor, to present evidence of mitigating factors, or to prove or explain anything.⁴⁹

PRELIMINARY INSTRUCTION NO. 2

You have previously been instructed by this Court as to the rules of law regarding the burden of proof, the credibility of witnesses, and the manner of weighing testimony. You have also been instructed as to the definition of reasonable doubt. The rules and definitions also apply in this second stage of proceedings.

⁴⁸ Sample jury instructions for the penalty phase of a death penalty trial provided by Paula Sites of the Public Defender Council. See Paula Sites memo to Kathryn Janeway, August 7, 2001. The instructions here are adapted from instructions given by Judge Patricia Gifford in *State v. Jeremy Gross* and by Judge Robyn Moberly in *State v. Kerrie Price* and do not address questions raised about the constitutionality of Indiana's jury override provisions in light of *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000) and *Jones v. U.S.*, 526 U.S. 227 (1999).

⁴⁹ Indiana Pattern Jury Instruction 15.09.

PRELIMINARY INSTRUCTION NO. 3

In the second phase of this trial, the burden is upon the State to prove to each of you beyond a reasonable doubt at least one specific aggravating circumstance set forth in the Charging Information wherein the State is seeking the death penalty. You are to consider both aggravating and mitigating circumstances and recommend whether the death penalty, life without parole, or a term of years determined by the judge should be imposed.

The jury may consider all of the evidence introduced at the trial stage of the proceedings, together with any new evidence presented at this hearing.

PRELIMINARY INSTRUCTION NO. 4

A mitigating factor is anything about [Defendant] or the offense which any individual juror believes should be taken into account as tending to support a sentence less than death. Even where there is no excuse or justification for the offense, our law requires consideration of more than just the bare facts of the offense in determining the appropriate sentence.

Mitigating factors are any facts relating to [Defendant's] age, character, education, environment, mental state, life, and background, or any aspect of the offense itself and his involvement in it, which any individual juror believes makes him less deserving of the punishment of death or life without parole.

Mitigating factors are different than aggravating factors in a number of ways. First, mitigating factors need not be proven beyond a reasonable doubt. Second, mitigating factors need not be found unanimously. Each juror must consider and weigh any mitigating factor he or she personally finds to exist without regard to whether other jurors agree with that determination. Finally, unlike aggravating factors, there are no limits on what factors an individual juror may find as mitigating.

Mitigation may be established by any evidence introduced by either party at either the guilt phase or the penalty phase of the trial. The weight you give to a particular mitigating factor is a matter for your own moral, factual, and legal judgment. However, you may not refuse to consider any mitigating factor by giving it no weight.⁵⁰

PRELIMINARY INSTRUCTION NO. 6

Your decision as to the appropriate sentence in this case is a very valuable one. Your decision is important because you have been selected

⁵⁰ Authority: *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Burris v. State*, 558 N.E.2d 1067 (Ind. 1990).

as a group that represents the defendant's peers and because you represent collectively the standards of the community. In light of this, the Court will give your decision as to the appropriate sentence great consideration.⁵¹

PRELIMINARY INSTRUCTION NO. 7

The jury may recommend the death penalty or life without parole only if it finds:

1. That the State has proved beyond a reasonable doubt; at least one aggravating circumstance exists; and
2. That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The death penalty is never mandatory or required under any set of circumstances.

The reasonable doubt standard that applies in the sentencing hearing is the same as that used in the trial stage of these proceedings.⁵²

PRELIMINARY INSTRUCTION NO. 8

The Court shall make final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider.

The Court is not bound by the jury's recommendation.⁵³

FINAL INSTRUCTION NO. 1

Aggravating factors are facts concerning the circumstances of a crime that are above and beyond the enormity of the offense. An aggravating factor is one that can enhance or increase the degree of moral blameworthiness of the Defendant; and tends to support imposition of the extreme penalties of death or life without parole. You are not permitted to consider any factors as weighing in favor of a sentence of death or life without parole other than the [number] aggravator(s) charged by the State.

⁵¹ Authority: *Roark v. State*, 644 N.E.2d 565 (Ind. 1994).

⁵² Authority: IC 35-50-2-9.

⁵³ Authority: IC 35-50-2-9.

The State must prove at least one charged aggravating factor beyond a reasonable doubt to the satisfaction of each and every juror. In other words; you must unanimously find at least one specific charged aggravating factor was proved beyond a reasonable doubt before you may consider recommending the death sentence. If you do not so find, you must recommend against both the death penalty and life without parole.

If you find unanimously that an alleged aggravating factor is proven beyond a reasonable doubt, that does not automatically or necessarily mean that you should recommend the death sentence or life without parole. Instead, such a finding only means that you must then consider other factors -specifically, mitigating factors -- before deciding whether a sentence of death, life without parole, or a term of years determined by the judge is appropriate.⁵⁴

FINAL INSTRUCTION NO. 2

The word mitigating circumstance does not mean an excuse or justification for the offense for which the Defendant has already been convicted. A mitigating circumstance is any fact or set of facts which may be considered extenuating or reducing the moral culpability of the Defendant or making the Defendant less deserving of the extreme punishment of death or life without parole. Mitigating evidence may consist of those facts and circumstances about life and character that you need to know in order to make a reasoned decision as to whether [Defendant] should suffer the penalty of death or of life without parole or a term of years determined by the judge. The law requires that you consider all mitigating evidence when determining the appropriate penalty in this case.⁵⁵

FINAL INSTRUCTION NO. 3

In weighing the aggravating circumstances against the mitigating circumstances, the fact that the Defendant has been found guilty of murder, in and of itself, is not an aggravating circumstance.

FINAL INSTRUCTION NO. 4

This court granted the State's motion to incorporate the evidence from the guilt phase into the penalty phase of this case. That means you may consider evidence presented at the guilt phase in deciding the appropriate sentence for . However, you may consider only that evidence which bears directly upon the mitigating factors as you find them to be, or the charged aggravating factor(s). Additionally, you may not consider any

⁵⁴ Authority: IC 35-50-2-9; *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); *Bivins v. State*, 642 N.E.2d 928 (Ind. 1994); *Pope v. State*, 737 N.E.2d 374 (Ind. 2000).

⁵⁵ Authority: *Lockett and Burris* (supra note 39).

evidence the court ordered stricken or ordered you not to consider in the guilt phase.⁵⁶

FINAL INSTRUCTION NO. 5

In considering whether any mitigating circumstances exist you may consider all the evidence introduced during these proceedings, regardless of who introduced such evidence.

FINAL INSTRUCTION NO. 6

The determination of the weight to be accorded the aggravating and mitigating circumstances is not a fact which must be proved beyond a reasonable doubt but is a balancing process for the jury.

FINAL INSTRUCTION NO. 7

The law requires that all jurors agree to the existence of at least one (1) specific charged aggravating circumstance before any recommendation on either death or life without parole may be made to the Court.

With respect to mitigating circumstances; your findings need not be unanimous. Each juror must weigh in the balance any mitigating circumstances he or she thinks have been established by the evidence, whether or not other jurors are likewise convinced of those mitigating circumstances.⁵⁷

FINAL INSTRUCTION NO. 8

You are to consider both aggravating and mitigating circumstances and recommend whether the death penalty, life without parole should be imposed, or neither be imposed. You may consider all the evidence introduced at this hearing.

If the State failed to prove beyond a reasonable doubt the existence of one (1) aggravating circumstance, you shall not recommend the death penalty or life without parole.

If you unanimously agree that the State did prove beyond a reasonable doubt the existence at least one (1) of the aggravating circumstances charged, but you find any mitigating circumstances outweigh the aggravating circumstance(s), you shall not recommend the death penalty or life without parole be imposed.

If you unanimously agree that the State did prove beyond a reasonable doubt the existence of at least one (1) aggravating circumstance- and you

⁵⁶ Authority: *Bivins v. State*, 642 N.E.2d 928 (Ind. 1994).

⁵⁷ Authority: Indiana Pattern Jury Instruction 15.08; IC 35-50-2-9.

further find that such aggravating circumstance outweighs any mitigating circumstances, you may recommend that the death penalty or life without parole be imposed.⁵⁸

FINAL INSTRUCTION NO. 9

If the death penalty is not imposed; the sentence for Murder may be either life imprisonment without parole or a fixed sentence of imprisonment ranging from forty-five (45) to sixty-five (65) years for each count of Murder. These sentences may be imposed to run at the same time (concurrently) or one after the other (consecutively). [Include sentences for any other convictions]

A defendant sentenced to a specific number of years can earn credit for good behavior to apply against the sentence, with a maximum allowable credit of fifty percent (50%) of the sentence imposed by the Court.

A sentence of life without parole means that the defendant does not earn credit for good behavior and the sentence is deemed served only upon the death of the defendant while in the custody of the Department of Corrections.

The Governor of Indiana has the power, under the Indiana Constitution, to grant a reprieve, commutation, or pardon to a person convicted and sentenced for Murder. The Constitution leaves it entirely up to the Governor whether and how to use this power. The power is used sparingly and its imposition, while possible, should not be considered as a likely result.⁵⁹

FINAL INSTRUCTION NO. 10

Your recommendation is an integral part of the death sentencing process. The law requires that your recommendation be given great weight and serious consideration by the trial judge.⁶⁰

I. Burden of Proof at Trial: Beyond

a Reasonable Doubt

"A 'reasonable doubt' is a fair, actual, and logical doubt that arises in your mind after an impartial consideration of all of the evidence and circumstances in the case."⁶¹

A jury that has a reasonable doubt about the defendant's guilt is required to find the

⁵⁸ Authority: IC 35-50-2-9.

⁵⁹ Indiana Pattern Jury Instruction 15.13; IC 35-50-2-9(d).

⁶⁰ Indiana Pattern Jury Instruction 15.14.

⁶¹ *Ben-Yisrayl f/k/a Christopher Peterson, v. State*, 729 NE2d 102, 110, n. 7 (Ind. 2000).

defendant to be "not guilty."

J. Bifurcated Process

Unlike non-capital cases where a single proceeding contains both the fact-finding phase to determine guilt or innocence and the sentencing phase to determine punishment, capital defendants are tried in a bifurcated process where judgment and sentence are determined in two separate trials.⁶² Separately from its finding of guilt and before recommending a capital sentence, the jury must find both that (1) the state has proven beyond a reasonable doubt the existence of the charged aggravator, and (2) the aggravator outweighs any mitigating circumstances.⁶³

K. Sentencing Court's Restriction to Consider Only Statutory Aggravators

In imposing a capital sentence, the sentencer may only consider the listed statutory aggravators, reducing the chance of arbitrary sentencing. Those aggravators are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit any of the following:

- (A) Arson (IC 35-43-1-1).
- (B) Burglary (IC 35-43-2-1).
- (C) Child molesting (IC 35-42-4-3).
- (D) Criminal deviate conduct (IC 35-42-4-2).
- (E) Kidnapping (IC 35-42-3-2).
- (F) Rape (IC 35-42-4-1).
- (G) Robbery (IC 35-42-5-1).
- (H) Carjacking (IC 35-42-5-2).
- (I) Criminal gang activity (IC 35-45-9-3).
- (J) Dealing in cocaine or a narcotic drug (IC 35-48-4-1).

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

⁶² See IC 35-50--2-9(d).

⁶³ See IC 35-50--2-9(k).

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, probation officer, parole officer, community corrections worker, home detention officer, fireman, judge, or law enforcement officer, and either:

- (A) the victim was acting in the course of duty; or
- (B) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder.

(9) The defendant was:

- (A) under the custody of the department of correction;
- (B) under the custody of a county sheriff;
- (C) on probation after receiving a sentence for the commission of a felony; or
- (D) on parole;

at the time the murder was committed.

(10) The defendant dismembered the victim.

(11) The defendant burned, mutilated, or tortured the victim while the victim was alive.

(12) The victim of the murder was less than twelve (12) years of age.

(13) The victim was a victim of any of the following offenses for which the defendant was convicted:

- (A) Battery as a Class D felony or as a Class C felony under IC 35-42-2-1.
- (B) Kidnapping (IC 35-42-3-2).
- (C) Criminal confinement (IC 35-42-3-3).
- (D) A sex crime under IC 35-42-4.

(14) The victim of the murder was listed by the state or known by the defendant to be a witness against the defendant and the defendant committed the murder with the intent to prevent the person from testifying.

(15) The defendant committed the murder by intentionally discharging a firearm (as defined in IC 35-47-1-5):

- (A) into an inhabited dwelling; or
- (B) from a vehicle.

(16) The victim of the murder was pregnant and the murder resulted in the intentional killing of a fetus that has attained viability (as defined in IC 16-18-2-365).⁶⁴

L. Open-ended Mitigation Evidence

In imposing a capital sentence, the sentencer may consider any mitigation evidence whatsoever, increasing the chance for leniency. Our statute provides the following:

(c) The mitigating circumstances that may be considered under this section are as follows:

- (1) The defendant has no significant history of prior criminal conduct.
- (2) The defendant was under the influence of extreme mental or emotional disturbance when the murder was committed.
- (3) The victim was a participant in or consented to the defendant's conduct.
- (4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.
- (5) The defendant acted under the substantial domination of another person.
- (6) The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.
- (7) The defendant was less than eighteen (18) years of age at the time the murder was committed.
- (8) Any other circumstances appropriate for consideration.⁶⁵

M. Victims Not Allowed to Speak Before Jury Recommendation

The murder victim's family and friends are not allowed to speak before the jury

⁶⁴ See IC 35-50--2-9(b)(1)-(16).

⁶⁵ See IC 35-50--2-9(c)(1)-(8).

makes its sentencing recommendation, reducing the chance that the jury's emotions would be inflamed by the grief and loss of the survivors.

N. Prohibition Against a Capital Sentence for the Mentally Retarded

Indiana law prohibits the state from seeking a capital sentence for a mentally retarded defendant.⁶⁶

O. Prohibition Against a Capital Sentence for Juveniles Under 16 Years Old

A person who was under the age of 16 when he committed a capital crime is not eligible for the death penalty.⁶⁷

P. Jury Override

Indiana's capital sentencing statute gives the trial court the power to override a jury's recommendation for or against a capital sentence. Thus, if a jury were to recommend death in a case where the trial court disagreed that death was warranted, the court could impose a sentence of life without parole despite the jury's recommendation.

The same provision has been used by trial courts to override the jury's recommendation to impose life without parole and to instead impose death, where the trial court felt that such was the more appropriate sentence. United States Supreme Court Justice Thurgood Marshall expressed concern over a trial court's overriding of a jury's recommendation against death, noting that the trial court's pronouncement of a death sentence despite the jury's recommendation showed a blatant disregard of the

⁶⁶ See IC 35-50--2-9(a).

⁶⁷ The United States Supreme Court has upheld capital sentencing for older minors. See *Stanford v. Kentucky*, 492 U.S. 261, *reh'g denied*, 492 U.S. 937 (1989) (upholding capital sentence for 17 year old); *Wilkins v. Missouri*, 492 U.S. 361, *reh'g denied*, 492 U.S. 937 (1989) (upholding capital sentence for 16 year old). But see *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (striking down capital sentencing for 15 year olds).

defendant's due process expectations.⁶⁸ However, a trial court's capital sentencing power also can provide a measure of proportionality to the capital sentencing process in general.

Q. Proportionality Review

Our Supreme Court conducts a proportionality review with an eye toward ascertaining that a capital sentence is proper for the particular defendant. This proportionality review "addresses whether the death sentence is appropriate to the offender and the offense, not whether the sentence is reasonable in light of all other cases imposing a similar sentence."⁶⁹

Conclusion

The long list above shows that many safeguards are in place. Great effort, time, and resources, both human and financial, have gone into constructing a system of multiple safeguards that work both independently and in concert.

One of the most important factors in safeguarding a capital defendant from wrongful execution is quality of defense counsel. To comply with a capital defendant's constitutional right to effective counsel, Indiana has developed an integrated complement of capital defense counsel guidelines and resources, including Indiana Criminal Rule 24, the Office of the Public Defender, the Public Defender Council, the Public Defender Commission, and the Public Defense Fund.

Criminal Rule 24 governing appointed defense counsel competency, training, compensation, and workload standards has helped to ensure that a capital defendant's legal representation at trial and on appeal is properly qualified and has the time to devote to the case. Further, Rule 24 provides for two defense attorneys at trial, and any necessary support services. There is no limitation on the number of hours that defense

⁶⁸ *Garner v. Florida*, 430 U.S. 349, 365 (1977) (J. Marshall, dissenting).

⁶⁹ *Stevens v. State*, 691 N.E.2d 412, 438 (Ind. 1998).

counsel can work on a death penalty case.

The office of the Public Defender provides seasoned capital defense counsel with institutional expertise and resources to indigent capital petitioners in postconviction proceedings. The Public Defender Council provides advisory, educational, technical, and research support on request for attorneys who represent capital defendants, from the time a death penalty request is filed through the final stage of review. The Public Defender Commission, through its county capital case reimbursement program, monitors Rule 24 compliance and thus assures that quality defense services are provided to indigent capital defendants.

Capital defendants are tried in a bifurcated process where judgment and sentence are determined in two separate trials.

Adequate legal representation includes all the support services that go along with developing and presenting the best defense. A defendant has the right to mitigation specialists, factual investigation specialists, and other experts to aid in his defense. The state reimburses counties 50% of these costs. There are no express limitations on support services. At the postconviction phase, the same level of services is made available to the petitioner through the office of the Public Defender.

The review process is another of the most important safeguards. A capital sentence undergoes mandatory Indiana Supreme Court review, including a proportionality review to determine "whether the death sentence is appropriate to the offender and the offense, not whether the sentence is reasonable in light of all other cases imposing a similar sentence."⁷⁰

A capital case has multiple levels of review available for checking and double checking the procedural fairness of the trial. The levels are multiple in terms of both

⁷⁰ *Stevens v. State*, 691 N.E.2d 412, 438 (Ind. 1998).

scope and scale. There are four different review avenues, layered so that local decisions are reviewed by state court and state decisions are reviewed by federal court.

A capital defendant may seek a change of venue for his trial if he feels he would get an unfair trial in the charging county. He has a right to trial by a twelve-person jury, to have his jury sequestered to reduce the chance of outside influence, and to have his jury instructed on the presumption of his innocence, the state's burden of proof, and the availability of sentence alternatives to death. And the trial judge can override a jury's recommendation of death if the judge deems that recommendation inappropriate.

The murder victim's family and friends are not allowed to give victim impact evidence before the jury makes its sentencing recommendation, reducing the chance that the jury would be swayed by the grief and emotions of the survivors. The sentencer can only consider those aggravating factors delineated in our statute, decreasing the chance of arbitrariness, but may consider any mitigation evidence whatsoever, increasing the chance for leniency. The sentencer may give independent weight to evidence of the defendant's character, record, and background, and the circumstances of the offense that might justify a penalty less severe than death. Defendants who are mentally retarded or who were under 16 years old at the time of the crime are not eligible for a capital sentence regardless of the heinousness of their crime.

A powerful, extensive, and expensive system of safeguards, manned with many of Indiana's best legal experts, is in place to protect an innocent defendant. Additional safeguards were discussed, e.g., video taping confessions, with no consensus reached.

Yet with all of these potent safeguards and their huge costs in terms of human effort, time, and money, no human system is failsafe. While it is true that an error may not ever occur, it is also true that it might. Insincere "jailhouse snitch" testimony, mistaken eye-witness identification, wrongfully suppressed evidence, false confessions,

and questionable scientific evidence could lead to a wrongful conviction and, if not caught and corrected, a wrongful sentence.

An especially vigilant concern for due process and fairness should be a hallmark of capital proceedings at all stages. Indiana has forged numerous and formidable safeguards to ensure to the best of our human ability that an innocent person is not executed.

II.

Whether our special rules requiring definitively trained capital defense counsel are working to ensure that a capital defendant's legal representation is properly qualified

*"The right to the effective assistance of counsel is . . . the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted--even if defense counsel may have made demonstrable errors--the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. . . . While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators."*⁷¹

Background

The Sixth Amendment to the United States Constitution guarantees that the accused "shall enjoy . . . the assistance of counsel for his defense." Yet nationwide the most common capital case error resulting in reversal is that of ineffective assistance of defense counsel.⁷² Thus, quality of counsel provided to capital defendants has arisen as a leading concern in the area of capital litigation. The potential ramifications when a capital defendant lacks competent defense counsel comprised the main topic of discussion in the June 27, 2001, Capitol Hill committee hearings regarding the Innocence Protection Act.⁷³ Ineffective assistance of counsel in capital trials was discussed by Supreme Court Justice Sandra Day O'Connor in her July 2, 2001, speech to the Minnesota Women Lawyers Association.⁷⁴ "Perhaps it's time to look at minimum

⁷¹ *Games v. State*, 684 N.E.2d 466, 479 n. 17 (Ind. 1997) (quoting *United States v. Cronin*, 466 U.S. 648, 656-57, 104 S.Ct. 2039, 2045-46, 80 L.Ed.2d 657, 666-67 (1984)).

⁷² James S. Liebman, "A Broken System: Error Rates in Capital Cases, 1973-1995," Columbia University School of Law, June 12, 2000, p.5.

⁷³ Reported on Morning Edition, National Public Radio, June 28, 2001.

⁷⁴ "O'Connor Questions Death Penalty," Associated Press, as reported in The New York Times and on Morning Edition, National Public Radio, July 3, 2001.

standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used," she said.⁷⁵

The convicted bears the burden of proving ineffective assistance of counsel, which requires proving both deficient performance by counsel and resulting prejudice to the defendant. This is a heavy burden of proof, but one that is nevertheless met by some capital inmates despite the fact that counsel is presumed by law to be effective. The fact that nationwide the most common capital error requiring reversal is that of ineffective assistance of defense counsel demonstrates the poor representation that some capital inmates in this country have had the misfortune of experiencing and the fortune of having had reversed.

In the 1984 case of *Strickland v. Washington*, the United States Supreme Court established the first test for determining whether a defendant had received effective representation.⁷⁶ *Strickland* established the ineffective assistance of counsel test used today. The Court did not articulate what types of defense behavior constituted ineffective assistance but said that "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice."⁷⁷ To prove ineffective assistance, the convicted needs to prove that the outcome of the trial would have been different if not for the alleged improper acts or omissions of defense counsel. However,

⁷⁵ "She also said defendants with more money get better legal defense. In Texas last year, she said, people represented by court-appointed attorneys were 28 percent more likely to be convicted than those who hired their own attorneys. If convicted, they were 44 percent more likely to be sentenced to death." *Id.*

In 1999 the Illinois Special Supreme Court Committee on Capital Cases recommended basic capital litigation training and competency levels not only for appointed defense counsel, but also for retained defense counsel, noting that "retained counsel were involved in all 12 of the [Illinois] cases where defendants were sentenced to death and later acquitted or exonerated." *Findings and Recommendations of the Special Supreme Court Committee on Capital Cases*, Hon. Thomas R. Fitzgerald, Chairman, October 28, 1999, pp. 13 and 3-33.

⁷⁶ *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

⁷⁷ *Strickland*, 466 U.S. at 692.

the need for defense counsel to tailor a defense to the specific circumstances of each case precluded adoption of a "particular set of detailed rules for counsel's conduct."⁷⁸

Justice William Brennan, Jr., concurring and dissenting in part, supported the majority's attempt to enable an inmate to prove defense counsel's negligence and asserted that lower courts would have opportunities to "achieve progressive development of this area of the law."⁷⁹ Dissenting from the idea of allowing states to develop standards for judging counsel effectiveness in capital cases, Justice Thurgood Marshall noted that the quality of counsel has varied considerably from case to case, depending in part on the attorney's caseload and the defendant's ability to afford representation.⁸⁰

In light of the gravity of capital proceedings, Justice Marshall felt that it was not proper for different locales to have different standards for counsel competency because this would result in randomness in deliberations. At the same time Justice Marshall recognized that uniform standards to assess counsel competency were not possible, noting that it is "often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent."⁸¹ He also felt that placing the onus on the inmate to prove incompetence imposed a formidable burden.⁸² Instead, he suggested, evidence of ineffective assistance required a retrial "regardless of whether the defendant suffered demonstrable prejudice."⁸³

⁷⁸ *Id.* at 688.

⁷⁹ *Id.* at 702.

⁸⁰ *Id.* at 708.

⁸¹ *Id.* at 710.

⁸² *Id.* at 713.

⁸³ *Id.* at 712.

Justice Marshal objected to the majority's unwillingness to demand stricter adherence to due process when the proceedings are capital in nature, noting that the "severity and irrevocability of the sanction at stake" demanded that competency standards "be applied especially stringently in capital sentencing proceedings."⁸⁴

Noting that "capital proceedings need to be policed at all stages by an especially vigilant concern for procedural fairness,"⁸⁵ Justice Brennan emphasized that review of defense counsel's performance should be available at every stage of the criminal process. He wanted to hold counsel especially responsible for a high standard of representation regarding the presentation of mitigation evidence at trial, which he felt would minimize the possibility of a death sentence being "imposed out of whim, passion, prejudice, or mistake"⁸⁶ by emphasizing due process during the developmental stage of capital proceedings.

Defense Representation in Indiana

*A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*⁸⁷

In Indiana, the state of the law remains that the *Strickland* test is applied to ineffective assistance of counsel claims that arise from counsel conduct at any stage of the criminal process, whether at the plea hearing,⁸⁸ during trial,⁸⁹ at the penalty phase,⁹⁰

⁸⁴ *Id.* at 716.

⁸⁵ *Id.* at 704.

⁸⁶ *Id.* at 705 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982)(O'Connor, J., concurring)).

⁸⁷ Ind. Professional Conduct Rule 1.1.

⁸⁸ See, e.g., *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (conviction and sentence reversed due to ineffective assistance at guilty plea hearing) and *Prowell v. State*, 741 N.E.2d 704 (Ind. 2001) (same). In order to establish that a guilty plea would not have been entered if trial counsel had performed adequately, the convicted must show that a defense was overlooked or impaired and that there was a reasonable probability of success at trial. *Id.* at 717.

on direct appeal,⁹¹ or at postconviction proceedings.⁹² On judicial review of a conviction or sentence, a defendant may raise a claim of ineffective assistance at any stage of the review process, whether immediately after trial on a Motion to Correct Error, soon thereafter on direct appeal to our Supreme Court, later on petition to the trial court for postconviction relief,⁹³ on appeal to our Supreme Court from the denial of postconviction relief,⁹⁴ on petition to the federal district court for writ of habeas corpus (as long as it was first raised in state court)⁹⁵ or on appeal to the Seventh Circuit Court of Appeals from the denial of that writ (same).⁹⁶

To establish a violation of the Sixth Amendment right to effective assistance of counsel, the defendant must prove both deficient performance and resulting prejudice.⁹⁷

⁸⁹ See, e.g., *Dillon v. Duckworth*, 751 F.2d 895 (7th Cir. 1984) (conviction and sentence reversed due to ineffective assistance at trial) and *Miller v. Anderson*, 255 F.3d 455 (7th Cir. 2001) (same).

⁹⁰ See, e.g., *Brewer v. Aiken*, 935 F.2d 850, 852, fn. 1. (7th Cir. 1991) (sentence reversed due to ineffective assistance at penalty phase).

⁹¹ See, e.g., *Ben-Yisrayl (f/k/a Greagree C. Davis) v. State*, 738 N.E.2d 253 (Ind. 2000) (1984 sentence reversed at postconviction proceedings due to ineffective assistance of appellate counsel).

Note that proving ineffective assistance of appellate counsel may require the petitioner to overcome the double presumption of attorney competence at *both* trial *and* appellate levels. *Woods v. State*, 701 N.E.2d 1208, 1221 (Ind.1998).

⁹² See, e.g., *Daniels v. State*, 741 N.E.2d 1177 (Ind. 2001) (evidence insufficient to find defendant's postconviction counsel ineffective for allegedly failing to investigate and present mitigation evidence).

⁹³ See, e.g., *Ben-Yisrayl (f/k/a Greagree C. Davis) v. State*, 738 N.E.2d 253 (Ind. 2000) (at postconviction proceedings, 1984 sentence reversed due to ineffective assistance of counsel).

⁹⁴ See, e.g., *Rondon v. State*, 711 N.E.2d 506 (Ind. 1999) (on appeal from the denial of postconviction relief, 1985 sentence reversed due to ineffective assistance of counsel).

⁹⁵ See, e.g., *Brewer v. Shettle*, 917 F.2d 1306 (7th Cir. 1990) (on petition for writ of habeas corpus, district court reversed 1978 sentence on grounds of ineffective assistance; reversal affirmed on appeal).

⁹⁶ See, e.g., *Miller v. Anderson*, 255 F.3d 455 (7th Cir. 2001) (on appeal from district court's denial of petition for writ of habeas corpus, 1991 sentence and conviction reversed due to ineffective assistance).

Both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.⁹⁸ Proving deficient performance requires showing that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms.⁹⁹ Proving prejudice requires showing that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.¹⁰⁰

A reviewing court presumes that counsel's performance was effective, and overcoming this presumption requires "strong and convincing" evidence.¹⁰¹ Indeed, "the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential" to that presumption.¹⁰² Ineffectiveness of counsel revolves around the particular facts of each case. Reviewing courts will not speculate about what may have been the most advantageous strategy,¹⁰³ and isolated bad tactics

⁹⁷ *Strickland*, 466 U.S. at 687.

⁹⁸ *Id.* at 698.

⁹⁹ *Ben-Yisrayl v. State*, 729 N.E.2d 102 (2000).

¹⁰⁰ However, "[A]n analysis focussing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 842, 122 L.Ed.2d 180 (1993). "To set aside a conviction or sentence *solely* because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." *Id.* at 369-70, 113 S.Ct. at 842-43 (emphasis added). In *Lockhart*, the defendant sought relief based on his attorney's failure to make an objection at his sentencing proceeding, an objection sustainable under case law at the time of the proceeding but that was later overruled. The U.S. Supreme Court refused to grant the defendant a "windfall" based on fortuitous timing, and held that the defendant had suffered no prejudice within the meaning of *Strickland* because the sentencing result was neither unreliable nor fundamentally unfair.

¹⁰¹ *Benefiel v. State*, 716 N.E.2d 906, 912 (Ind. 1999).

¹⁰² *Ben-Yisrayl*, 738 N.E.2d at 262 (citing two other capital cases, *Conner v. State*, 711 N.E.2d 1238, 1252 (Ind.1999) and *Bieghler v. State*, , 690 N.E.2d 188, 195-96 (Ind. 1997)).

¹⁰³ See, e.g., *Lambert v. State*, 743 N.E.2d 719, 743 (Ind. 2001) (holding that it was reasonable for counsel to emphasize the defendant's character during the penalty phase instead of relying on complicated mental health issues); *Wisehart v. State*, 693 N.E.2d 23, 48 n. 26 (Ind. 1998) ("[W]hich witnesses to call is the epitome of a strategic decision."); *Wisehart v. State*, 693 N.E.2d 23, 48 (Ind. 1998) ("When mitigating evidence has already been presented, the failure of counsel

or inexperience does not necessarily amount to ineffective assistance; nonetheless, perfunctory representation does not satisfy the Sixth Amendment.¹⁰⁴ "Counsel is afforded considerable discretion in choosing strategy and tactics."¹⁰⁵ Counsel is given significant deference in choosing a strategy which, at the time and under the circumstances, he or she deems best.¹⁰⁶

There are many acts or omissions by which a capital defendant's attorney might render ineffective assistance.¹⁰⁷ Most commonly, ineffective assistance involves a failure to adequately investigate, prepare, or present an adequate defense or mitigating evidence.¹⁰⁸ Other forms of ineffectiveness include failure to object to evidence or to

to duplicate during the penalty phase the mitigating evidence presented to the jury during the guilt phase does not constitute deficient performance."); *Brown v. State*, 691 N.E.2d 438, 447 (Ind.1998) ("A decision regarding what witnesses to call is a matter of trial strategy which an appellate court will not second-guess."); *Timberlake v. State*, 690 N.E.2d 243, 261 (Ind. 1997) ("As a matter of trial strategy, a defense counsel in a capital case may decide what is the best argument to present during the penalty phase. After an investigation into potentially mitigating evidence, a defense counsel may decide that it would be better for his client not to argue, as mitigation evidence, defendant's background history such as a history of drug abuse and a bad family life.").

¹⁰⁴ *Smith v. State*, 547 N.E.2d 817, 819 (Ind. 1989).

¹⁰⁵ *Wrinkles v. State*, 2001 WL 738097, *9 (Ind.).

¹⁰⁶ *Id.* at *5.

¹⁰⁷ Ineffective assistance of counsel claims include claims of other error that, due to waiver or previous review, could only be raised in subsequent review proceedings by characterizing the claims as ineffective assistance of counsel, because such claims may be raised on direct appeal, in postconviction proceedings, or, if raised in state court, on petition for habeas corpus. See, e.g., *Ben-Yisrayl, f/k/a Christopher Peterson v. State*, 729 N.E.2d 102, 110 (Ind. 2000) (Ben-Yisrayl's failure to object at trial to jury instructions normally results in waiver of the opportunity to challenge the instructions on appeal; further, if an issue was known and available but not raised on direct appeal, it is normally waived. Ben-Yisrayl's failure to challenge the instructions both at trial and in his direct appeal resulted in a double waiver; so our Supreme Court recast Ben-Yisrayl's instructional challenges as ineffective assistance of counsel in this appeal from the denial of postconviction relief).

¹⁰⁸ "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake" Ind. Professional Conduct Rule 1.1, Comment.

prosecutor or witness statements,¹⁰⁹ failure to proffer or object to jury instructions,¹¹⁰ opening the door to damaging evidence that would otherwise not be allowed,¹¹¹ and basic lack of preparation.¹¹²

On the other hand, as our Supreme Court has said, defense counsel is not required to prophesy and act in accordance with future court rulings.¹¹³ And while counsel “should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf,”¹¹⁴ reasonableness is the standard, and “a lawyer’s failure to be a jurisprudential clairvoyant does not support a claim of ineffective assistance of counsel.”¹¹⁵ “[A]lthough egregious errors may be grounds for reversal, we do not second-guess strategic decisions requiring reasonable professional judgment even if the strategy or tactic, in hindsight, did not best serve the defendant’s interests.”¹¹⁶

Of the 86 Indiana defendants given a capital sentence since our capital sentencing statute’s 1977 implementation, 14 have had their sentences (and in some cases, also their convictions) overturned due to ineffective assistance of counsel; in some cases, death was reinstated on remand, in other cases a plea bargain resulted in

¹⁰⁹ To prove ineffective assistance of counsel due to the failure to object, the convicted must prove that the objection would have been sustained and that the failure resulted in prejudice. *Wrinkles* at *7; see also, *Timberlake v. State*, 690 N.E.2d 243, 259 (Ind.1997).

¹¹⁰ See, e.g., *Lambert v. State*, 743 N.E.2d 719 (Ind. 2001).

¹¹¹ See, e.g., *Miller v. Anderson*, 255 F.3d 455 (7th Cir. 2001).

¹¹² See, e.g., *Id.*

¹¹³ *State v. Van Cleave*, 674 N.E.2d 1293, 1303 (Ind. 1996).

¹¹⁴ Comment to Ind. Professional Conduct Rule 1.3. Diligence, which provides that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.”

¹¹⁵ *Van Cleave*, 674 N.E.2d at 1303 (supra, note 43).

¹¹⁶ *Wrinkles* at *5 (supra, note 35) (quoting *State v. Moore*, 678 N.E.2d 1258, 1261 (Ind.1997)).

a term of years.¹¹⁷ Thirteen of those 14 reversals were of sentences imposed prior to the adoption of Indiana Criminal Rule 24 governing appointed defense counsel competency, training, compensation, and workload standards.

A. The Indiana Public Defender Commission

The Public Defender Commission

In 1989 the Indiana General Assembly created the Indiana Public Defender Commission to make recommendations regarding standards for defense services provided to indigent defendants, to adopt guidelines and compensation schedules for reimbursement of a county's costs of providing indigent defense services, and to review and approve requests from county auditors for capital case reimbursement from the Public Defense Fund, a fund also created in the same law.¹¹⁸ The Commission's enabling statute requires the Commission to do the following:

(1) Make recommendations to the supreme court of Indiana concerning standards for indigent defense services provided for defendants against whom the state has sought the death sentence under IC 35-50-2-9, including the following:

(A) Determining indigency and eligibility for legal representation;

(B) Selection and qualifications of attorneys to represent indigent defendants at public expense;

(C) Determining conflicts of interest; and

¹¹⁷ In chronological order of original capital sentence imposition, those 14 consist of: (1) James Brewer, DOB 06/10/56; (2) Richard D. Moore, DOB 06/05/31 (on remand, capital sentence reinstated); (3) Gary Burris, DOB 12/17/56 31 (on remand, court reinstated capital sentence); (4) Richard Dillon, DOB 12/12/62; (5) Zolo Agona Azania, f/k/a Rufus Lee Averhart, DOB 12/12/54 (on remand, capital sentence reinstated); (6) Russell Ernest Boyd, DOB 02/13/58; (7) William J. Spranger, DOB 9/26/64; (8) Gregory Van Cleave, DOB 6/1/62 (on remand, capital sentence reinstated); (9) Charles Smith, DOB 10/10/53; (10) Chijoke Bomani Ben-Yisrayl, f/k/a Greagree C. Davis, DOB 1/6/62; (11) James Games, DOB 7/22/64; (12) Gorla Reynaldo Rondon, DOB 1/6/49; (13) Perry S. Miller, DOB 10/14/47; (14) Vincent Juan Prowell, DOB 3/4/64. [Dates of birth, used here as further identifying information, found in Steve Stewart and the Indiana Prosecuting Attorneys Council, *Indiana Death Row 2000*, June 1, 2000, pp. 120-202.]

¹¹⁸ P.L. 284-1989.

(D) Investigative, clerical, and other support services necessary to provide adequate legal representation.

(2) Adopt guidelines and standards for indigent defense services under which the counties will be eligible for reimbursement under IC 33-9-14, including but not limited to the following:

(A) Determining indigency and the eligibility for legal representation;

(B) The issuance and enforcement of orders requiring the defendant to pay for the costs of court appointed legal representation under IC 33-9-11.5;

(C) The use and expenditure of funds in the county supplemental public defender services fund established by IC 33-9-11.5;

(D) Qualifications of attorneys to represent indigent defendants at public expense;

(E) Compensation rates for salaried, contractual, and assigned counsel; and

(F) Minimum and maximum caseloads of public defender offices and contract attorneys.

(3) Make recommendations concerning the delivery of indigent defense services in Indiana.

(4) Make an annual report to the governor, the general assembly, and the supreme court on the operation of the Public Defense Fund.¹¹⁹

The Commission is composed of the following eleven members, none of whom may be a law enforcement officer or a court employee:

(1) Three members appointed by the governor, with no more than two of these individuals belonging to the same political party;

(2) Three members appointed by the chief justice of the supreme court, with no more than two of these individuals belonging to the same political party;

¹¹⁹ IC 33-9-13-3.

(3) One member appointed by the board of trustees of the Indiana criminal justice institute, who is an attorney admitted to practice law in Indiana;

(4) Two members of the house of representatives to be appointed by the speaker of the house of representatives - the members appointed under this subdivision may not be from the same political party; and

(5) Two members of the senate, to be appointed by the speaker pro tempore of the senate -- the members appointed under this subdivision may not be from the same political party.¹²⁰

The Indiana Supreme Court's division of state court administration provides general staff support to the Commission and may enter into contracts for any additional staff support that the division determines is necessary to implement the Commission's purpose.¹²¹

B. Criminal Rule 24

In 1990, its first year of operation, the Public Defender Commission worked on preparing a proposed new court rule regarding the competency, compensation, and workload standards to be required of appointed defense counsel in capital cases, and in the fall of that year submitted its proposal to the Indiana Supreme Court.¹²² The following spring, 1991, the Indiana Supreme Court issued a draft proposed amendment to Criminal Rule 24, incorporating many of the Commission's recommendations, and the Commission submitted a written response to the Court.¹²³ That fall, on October 25, 1991, the Court amended Criminal Rule 24, effective January 1, 1992.

¹²⁰ IC 33-9-13-1(a).

¹²¹ IC 33-9-13-4.

¹²² Indiana Public Defender Commission, Annual Report, 1999-2000, p. 3.

¹²³ Indiana Public Defender Commission, Annual Report, 1999-2000, p. 3.

Through the adoption of Rule 24, Indiana became the second state in the nation to enact rules requiring capital defense counsel to have specialized training and experience in order to better defend a capital defendant,¹²⁴ to be adequately compensated in order to attract able practitioners,¹²⁵ and to have a workload that allows the time necessary to effectively defend a capital defendant. Both prosecutors and the defense bar agree that Rule 24 has improved representation by capital defense lawyers.¹²⁶ “[A] death penalty verdict returned [since the adoption of Rule 24 is] more likely to be sustained on appeal, and the appellate court [is] less apt to find that defense counsel was ineffective.”¹²⁷

A review of a recent capital sentencing order from an Indiana trial court reveals attentiveness to Rule 24's requirements. In the summer of 2000, a jury found Michael Overstreet guilty of the confinement, rape, and murder of Kelly Eckart. In paragraph two of its 26-page order sentencing Mr. Overstreet to death, the trial court stated that Mr. Overstreet's original appointed counsel had been replaced with two, Rule 24-qualified

¹²⁴ In 1999, the Illinois Special Supreme Court Committee on Capital Cases “found that the most important and effective means of bringing about positive improvement in capital trials would be the establishment of minimum training and experience standards for the attorneys who try those cases.” *Findings and Recommendations of the Special Supreme Court Committee on Capital Cases*, Fitzgerald, Chairman, p1 of Executive Summary (supra, note 5). For the full discussion of this topic in that report, see also pp. 3-33.

¹²⁵ Illinois' recently enacted Capital Crimes Litigation Act, effective January 1, 2000, provides that appointed capital counsel are eligible for hourly compensation of up to \$125. See P.A. 91-589, sec. 10.

¹²⁶ As reported by Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and its Implacations for the Nation*, 29 IND. L. REV. 495, 509 (1996). Indiana Attorney General Karen Freeman-Wilson, member of the Criminal Law Study Commission, stated at the Commission's October 2000 meeting: “I have an advantage of having reviewed the death penalty from many perspectives given my experience as a deputy prosecutor, judge and public defender. . . . From experience, I . . . know that Criminal Rule 24 provides safeguards and assurances for Indiana defendants that may not exist in places where the death penalty has been fraught with error.”

¹²⁷ Lefstein, *Reform of Defense Representation in Capital Cases*, 29 IND. L. REV. at 509 (supra, note 56).

defense counsel when the State filed its death penalty charge, noting in relevant part as follows:

On April 20, 1998, Mr. Jeffrey Baldwin was appointed as lead counsel and Mr. Peter Nugent was appointed as co-counsel, all pursuant to Rule 24 of the Indiana Rules of Criminal Procedure. Mr. Eggers [Mr. Overstreet's original appointed attorney] was not qualified as counsel in a capital case pursuant to Rule 24, and removed on June 19, 1998. Mr. Eggers worked with Mr. Baldwin and Mr. Nugent between April 20, 1998 and June 16, 1998 to familiarize them with all discovery to said date. Mr. Baldwin and Mr. Nugent have worked continually on this case representing the Defendant since their appointment on April 20, 1998. Both attorneys have worked diligently on this case handling discovery matters, pre-trial motions, trial, and post trial matters and both attorneys have fully complied with the workload requirements of appointed counsel pursuant to Rule 24(B)(3). Mr. Baldwin qualified as lead counsel and Mr. Nugent qualified as co-counsel as required pursuant to Rule 24(B)(1) and (2) respectively.¹²⁸

Rule 24 provides an indigent capital defendant with at least five extra safeguards designed to ensure that the defendant's legal representation is properly qualified. First, Rule 24 requires the appointment of two attorneys, each meeting minimum competency, workload, and compensation standards, to represent a capital defendant.

Second, Rule 24's competency and training standards establish baseline experience, skill, and continuing education levels in capital litigation for capital defense attorneys.¹²⁹

Third, Rule 24's workload standards provide standards designed to ensure that a

¹²⁸ July 31, 2000, *State v. Overstreet*, "Order On Sentence Of Death Pursuant To Indiana Code § 35-50-2-9" of Judge Cynthia S. Emkes, Johnson Superior Court. In a different case, Judge Emkes vacated a death sentence in postconviction proceedings, finding appellate counsel ineffective for failing to raise on appeal trial counsel's failure to present mitigating evidence at the penalty phase. Our Supreme Court agreed and affirmed the postconviction court's decision. See *Ben-Yisrayl*, 738 N.E.2d 253.

¹²⁹ Indiana's Rules of Professional Conduct also require competence, but have less coercive power than Rule 24. "Maintaining Competence. To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education." Ind. Professional Conduct Rule 1.1, Comment.

capital defendant's attorney has sufficient time to devote to the case.

Fourth, Rule 24's compensation standards are designed to attract qualified attorneys to take on capital representation.

Fifth, the threat of withholding reimbursement from counties and defense attorneys adds enforcement power to Rule 24.

Rule 24: two defense attorneys

Rule 24 requires the appointment of two attorneys, each meeting minimum competency, workload, and compensation standards, to represent a capital defendant.¹³⁰ Rule 24's provisions regarding the trial phase begin with the requirement that upon the state's request for the death penalty, a trial court must appoint for an indigent defendant two capital trial qualified counsel.¹³¹ The Rule states as follows:

Upon a finding of indigence, it shall be the duty of the judge presiding in a capital case to enter a written order specifically naming two qualified attorneys to represent an individual in a trial proceeding where a death sentence is sought.¹³²

Thus, an indigent capital defendant in Indiana is provided with two defense attorneys. The rule only applies to capital cases requiring appointed counsel and has no bearing on capital cases in which privately retained counsel might be employed.

¹³⁰ In 1999, the Illinois Special Supreme Court Committee on Capital Cases recommended the appointment of two attorneys for capital defendants. See *Findings and Recommendations of the Special Supreme Court Committee on Capital Cases*, Fitzgerald, Chairman, 32-34 (supra, note 5).

¹³¹ "Indiana has a long history of providing counsel to indigent defendants, [citing *Webb v. Baird*, 6 Ind. 13, 18 (1854)(holding a criminal defendant had right to attorney at public expense if unable to afford or hire one on his own)] and our leadership on providing capable counsel to defendants in capital cases has attracted wide attention." Indiana Chief Justice Randall T. Shepard, *Building Indiana's Legal Profession*, __ IND. L. REV. (2001). See also *Bellmore v. State*, 602 N.E.2d 111 (1992), *rehearing denied* (indigent defendant is entitled to appointment of two qualified attorneys in capital trial).

¹³² Ind. Crim. Rule 24(B).

Rule 24: competency and training

Rule 24's competency and training standards provide safeguards designed to ensure that a capital defendant's attorney has sufficient experience, skill, and continuing education in capital litigation.

One of the attorneys appointed by the court must be designated as lead counsel. To qualify as lead trial counsel, an attorney must meet certain minimum criminal litigation experience and specialized capital training standards¹³³ in accordance with the following:

(a) be an experienced and active trial practitioner with at least five (5) years of criminal litigation experience;

(b) have prior experience as lead or co-counsel in no fewer than five (5) felony jury trials which were tried to completion;

(c) have prior experience as lead or co-counsel in at least one (1) case in which the death penalty was sought; and

(d) have completed within two (2) years prior to appointment at least twelve (12) hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.¹³⁴

The lead attorney's co-counsel must also meet certain minimum criminal litigation experience and specialized capital training standards in accordance with the following:

(a) be an experienced and active trial practitioner with at least three (3) years of criminal litigation experience; and

(b) have prior experience as lead or co-counsel in no fewer than three (3) felony jury trials which were tried to completion; and (c) have completed within two (2) years prior to appointment at least twelve (12) hours of training in

¹³³ States that have little or no defense attorney competency standards are now calling for such standards. See, e.g., Editorial, *Fixing the Death Penalty*, CHICAGO TRIBUNE, 1A, Dec. 29, 2000. Justice Sandra Day O'Connor said in a recent speech that it is time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel. See "O'Connor Questions Death Penalty," Associated Press, as reported in The New York Times and on National Public Radio, Morning Edition, July 3, 2001.

¹³⁴ Ind. Crim. Rule 24(B)(1).

the defense of capital cases in a course approved by the Indiana Public Defender Commission.¹³⁵

These provisions regarding experience and training do not apply in cases where counsel is employed at the defendant's expense.¹³⁶

In 1992 the Public Defender Commission assembled a roster of attorneys who met the above Rule 24 qualifications for appointment in capital cases as lead or co-counsel at trial, or as appellate counsel. Inclusion in the roster is not required for appointment in a capital case. The roster's purpose is to aid to trial judges in finding and appointing qualified counsel.¹³⁷ The Commission most recently updated the roster in 1998 after requesting attorneys to update their information, and the roster is available online.¹³⁸

Rule 24: workload

Rule 24's workload standards provide safeguards designed to ensure that a capital defendant's attorney has sufficient time to devote to the case. Criminal Rule 24(B)(3) requires that appointed trial counsel not carry caseloads exceeding 20 open felony cases while the capital case is pending in the trial court, that no new cases be assigned to trial counsel within 30 days of the capital trial date, and that none of the trial

¹³⁵ Ind. Crim. Rule 24(B)(2).

¹³⁶ In 1999, the Illinois Special Supreme Court Committee on Capital Cases recommended that not only appointed defense counsel but also retained defense counsel and prosecutors be required to meet certain minimum experience and training requirements. See *Findings and Recommendations of the Special Supreme Court Committee on Capital Cases*, Fitzgerald, Chairman, 13-19 (supra, note 5). See also a 1990 rule adopted by the Nevada Supreme Court that notes "It is important that counsel for the defendant, whether retained or appointed, possess the ability to represent the defendant with reasonable professional competence" and requires defense counsel to 1) have acted in no less than seven felony trials, at least two of which involved violent crimes, including one murder; 2) have acted as co-counsel in at least one death penalty trial; and 3) have been licensed to practice law for at least three years. Nev. Sup. Ct. R. 250 IV.A. These requirements apply unless the trial court "determines that an attorney otherwise has the competence and ability to represent a defendant in a capital case." *Id.*

¹³⁷ July 10, 2001, memorandum from Indiana Public Defender Council staff attorney Paula Sites to Indiana Criminal Law Study Commission staff attorney Kathryn Janeway.

¹³⁸ See www.state.in.us/judiciary/admin/pub_def/attindex.html.

counsel's cases will be set for trial within 15 days of the capital trial date. The rule addresses the workload of appointed and salaried capital counsel as follows:

In the appointment of counsel, the nature and volume of the workload of appointed counsel must be considered to assure that counsel can direct sufficient attention to the defense of a capital case.

(a) Attorneys accepting appointments pursuant to this rule shall provide each client with quality representation in accordance with constitutional and professional standards. Appointed counsel shall not accept workloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.

(b) A judge shall not make an appointment of counsel in a capital case without assessing the impact of the appointment on the attorney's workload.

(c) Salaried or contractual public defenders may be appointed as trial counsel in a capital case, if:

(i) the public defender's caseload will not exceed twenty (20) open felony cases while the capital case is pending in the trial court;

(ii) no new cases will be assigned to the public defender within thirty (30) days of the trial setting in the capital case;

(iii) none of the public defender's cases will be set for trial within fifteen (15) days of the trial setting in the capital case; and

(iv) compensation is provided as specified in paragraph (C).¹³⁹

Rule 24: compensation

Rule 24's compensation standards are designed to attract qualified attorneys to take on capital representation. To ensure compensation sufficient to attract competent,

¹³⁹ Ind. Crim. Rule 24(B)(3).

effective capital trial practitioners, Criminal Rule 24 mandates a baseline hourly rate of \$90 per hour.¹⁴⁰ The county that requested the capital sentence pays this expense, which is 50% reimbursable by the Commission if the county complies with the provisions of Criminal Rule 24. Regarding compensation of trial counsel and funding for investigative, expert, and other services necessary to prepare and present a capital defense, Criminal Rule 24 provides as follows:

All hourly rate trial defense counsel appointed in a capital case shall be compensated under subsection (1) of this provision upon presentment and approval of a claim for services detailing the date, activity, and time duration for which compensation is sought. Hourly rate counsel shall submit periodic billings not less than once every thirty days after the date of appointment by the trial court. All salaried capital public defenders compensated under subsection (4) of this provision shall present a monthly report detailing the date, activity, and time duration of services rendered after the date of appointment. Periodic payment during the course of counsel's representation shall be made.

(1) Hours and Hourly Rate. Defense counsel appointed at an hourly rate in capital cases filed or remanded after appeal on or after January 1, 2001, shall be compensated for time and services performed at the hourly rate of \$90.00 only for that time and those services determined by the trial judge to be reasonable and necessary for the defense of the defendant. The trial judge's determination shall be made within thirty days after submission of billings by counsel. Counsel may seek advance authorization from the trial judge, *ex parte*, for specific activities or expenditures of counsel's time.

The hourly rate set forth in this rule shall be subject to review and adjustment on a biennial basis by the Executive Director of the Division of State Court Administration. Beginning July 1, 2002, and July 1st of each even year thereafter, the Executive Director shall announce the hourly rate for defense counsel appointed in capital cases filed or remanded after appeal on or after January 1, of the years following the announcement. The hourly rate will be calculated using the Gross Domestic Product Implicit Price Deflator, as announced by the United

¹⁴⁰ Illinois' recently enacted Capital Crimes Litigation Act, effective January 1, 2000, provides that appointed capital counsel are eligible for hourly compensation of up to \$125. See P.A. 91-589, sec. 10.

States Department of Commerce in its May report, for the last two years ending December 31st preceding the announcement. The calculation by the Executive Director shall be rounded to the next closest whole dollar.

In the event the appointing judge determines that the rate of compensation is not representative of practice in the community, the appointing judge may request the Executive Director of the Division of State Court Administration to authorize payment of a different hourly rate of compensation in a specific case.

(2) Support Services and Incidental Expenses. Counsel appointed at an hourly rate in a capital case shall be provided, upon an ex parte showing to the trial court of reasonableness and necessity, with adequate funds for investigative, expert, and other services necessary to prepare and present an adequate defense at every stage of the proceeding, including the sentencing phase. In addition to the hourly rate provided in this rule, all counsel shall be reimbursed for reasonable and necessary incidental expenses approved by the trial judge. Counsel may seek advance authorization from the trial judge, ex parte, for specific incidental expenses.

Full-time salaried capital public defenders shall be provided with adequate funds for investigative, expert, and other services necessary to prepare and present an adequate defense at every stage of the proceeding, including the sentencing phase, as determined by the head of the local public defender agency or office, or in the event there is no agency or office, by the trial judge as set forth above.

(3) Contract Employees. In the event counsel is generally employed by the court of appointment to perform other defense services, the rate of compensation set for such other defense services may be adjusted during the pendency of the death penalty case to reflect the limitations of case assignment established by this rule.¹⁴¹

In 1999-2000, the Commission began studying the use of salaried public defenders as counsel in capital cases.¹⁴² Some claims from Marion County, e.g., those related to the cases of *State v. Gross* and *State v. Veal*, had been denied in part

¹⁴¹ Ind. Crim. Rule 24(C)(1)-(3).

¹⁴² Indiana Public Defender Commission, Annual Report, 1999-2000, p. 4.

because the attorneys' hourly compensation rate did not comply with Rule 24. In those cases for a period of time death penalty qualified salaried public defenders were handling the cases. In part this lead to the Supreme Court's recent amendment to Criminal Rule 24 providing for the use of salaried capital public defenders.¹⁴³ That amendment provides as follows:

(4) Salaried Capital Public Defenders. In those counties having adopted a Comprehensive Plan as set forth in I.C. 33-9-15 et. seq., which has been approved by the Indiana Public Defender Commission, and who are in compliance with Commission standards authorized by I.C. 33-9-13-3(2), a full-time salaried capital public defender meeting the requirements of this rule may be assigned in a capital case by the head of the local public defender agency or office, or in the event there is no agency or office, by the trial judge. Salaried capital public defenders may be designated as either lead counsel or co-counsel. Salaried capital lead counsel and co-counsel must be paid salary and benefits equivalent to the average of the salary and benefits paid to lead prosecuting attorneys and prosecuting attorneys serving as co-counsel, respectively, assigned to capital cases in the county.

Each year, by July 1, those counties wishing to utilize full-time salaried capital public defenders for capital cases shall submit to the Executive Director of the Division of State Court Administration the salary and benefits proposed to be paid the capital public defenders for the upcoming year along with the salaries and benefits paid to lead prosecutors and prosecutors serving as co-counsel assigned capital cases in the county in the thirty-six months prior to July 1, or a certification that no such prosecutor assignments were made. The Executive Director shall verify and confirm to the Indiana Public Defender Commission and the requesting county that the proposed salary and benefits are in compliance with this rule. In the event a county determines that the rate of compensation set forth herein is not representative of practice in the community, the county may request the Executive Director to authorize a different salary for a specific year.¹⁴⁴

¹⁴³ See Public Defender Commission staff attorney Thomas M. Carusillo's May 29, 2001, memorandum to Criminal Law Study Commission staff attorney Kathryn Janeway.

¹⁴⁴ Ind. Crim. Rule 24(C)(4).

During 1998 and 1999 the Public Defender Commission amended its capital guidelines to provide for reimbursement where standby counsel has been appointed for a defendant who has waived the right to counsel. Such counsel must meet Rule 24 lead counsel requirements.¹⁴⁵

Rule 24: reimbursement

Fifty percent reimbursement to counties of capital defense costs provides incentive to comply with Rule 24. The threat of withholding reimbursement from counties and defense attorneys adds enforcement power to the Rule.

In 1991 the Commission adopted eligibility guidelines for county reimbursement from the Public Defense Fund of the costs of indigent defense services in capital cases.¹⁴⁶ The guidelines became effective January 1, 1992, and require strict compliance with Criminal Rule 24.

Recently, Vanderburgh County had to repay reimbursement funds because trial counsel in two capital cases erroneously certified that they were in compliance with the workload restrictions set forth by Rule 24(B)(3).¹⁴⁷ In *State v. Prowell*, the county had to return \$18,898, and in *State v. Wrinkles*, the county had to return \$31,098 due to trial counsel's substantial non-compliance with Rule 24.¹⁴⁸

¹⁴⁵ Indiana Public Defender Commission, Annual Report, 1999-2000, p. 4.

¹⁴⁶ *Id.*

¹⁴⁷ Tom Hinesley, *Judicial Review of Death Sentences in Indiana - Office of the Public Defender of Indiana*, paper presented to the Criminal Law Study Commission at its October 2000 meeting, revised May 2001. See also Carusillo memo to Janeway (supra, note 73).

¹⁴⁸ Mr. Wrinkles, who had confessed, remains on Indiana's death row because our Supreme Court found that his counsel's Rule 24 workload violations did not constitute deficient performance or resulting prejudice. See *Wrinkles* at *16-17 (Ind.). Mr. Prowell, who had been advised to plead guilty without benefit of a plea agreement, had his convictions and sentence overturned. See *Prowell*, 741 N.E.2d at 716.

On appeal from the denial of postconviction relief, our Supreme Court reversed Vincent Prowell's guilty plea and death sentence on grounds of ineffective assistance of counsel for failure to investigate and present mitigating evidence. The Court found Rule 24 workload violations that may have contributed to the deficient performance by counsel.¹⁴⁹

The Court found that Mr. Prowell's counsel carried a workload of nearly twice the number of cases allowed under Criminal Rule 24 and had a major felony trial scheduled for the period Rule 24 seeks to devote to the capital representation. As counsel testified at the postconviction hearing, given the rigors of counsel's high caseload and the demands of his other felony case, counsel was not prepared to try Mr. Prowell's case. Counsel testified that he took no steps to select a jury, was not prepared to question potential capital jurors, was not prepared to present a defense in the guilt phase, and was not prepared to present mitigation. Instead, counsel advised Mr. Prowell to plead guilty to two death-penalty-eligible murders without a sentencing agreement.

The Court found that in light of counsel's failure to investigate and present the severity of Mr. Prowell's mental health problems, which related to any insanity defense, to the plea of guilty but mentally ill, and to the appropriateness of the death penalty, there was a reasonable probability that the trial court's decision to sentence Mr. Prowell to death was a direct result of counsel's ineffectiveness.¹⁵⁰

However, violation of Criminal Rule 24 is not *per se* ineffective assistance of counsel requiring reversal. Matthew Wrinkles attempted to overturn his conviction and capital sentence for the murder of his wife and her brother and sister-in-law. The evidence at trial showed that wife Debbie Wrinkles had taken the couple's young

¹⁴⁹ See *Prowell*, 741 N.E.2d 704. On remand, the State dropped its request for the death penalty against Prowell.

¹⁵⁰ *Id.* at 715.

children and moved in with her brother and his wife. Mr. Wrinkles donned an army camouflage uniform, painted his face, jumped the backyard fence at the in-laws' home, cut the telephone lines, and shot all three adults in front of the young children.¹⁵¹

On review, Mr. Wrinkles argued that his two appointed attorneys, each a part time public defender, acted deficiently because throughout his representation each lawyer carried a felony caseload exceeding that permitted under Rule 24(B)(3)(c).¹⁵² The rule requires that salaried or contractual public defenders can only be appointed as trial counsel in capital cases if the public defender's caseload will not exceed twenty felony cases while the capital trial is pending; that no new cases will be assigned to the public defender within thirty days of the capital trial; and that none of the public defender's cases will be set for trial within fifteen days of the capital trial. Our Supreme Court described the noncompliance thus (record citations omitted, initials used for attorney names):

Although attorney D was in compliance with subsection (B)(3)(c)(i) of Rule 24 when he was appointed lead counsel on July 21, 1994, he was out of compliance a month later. When attorney V was appointed co-counsel on July 28, 1994, his inventory of public defender cases totaled forty-two open felony cases, more than twice the maximum permitted. At one point attorney D's felony caseload reached thirty-three while attorney V's felony caseload reached fifty-six. In February 1995, just three months before Wrinkles' trial began, attorney V finally asked the trial court to remove him from some cases so he could devote more time to Wrinkles' case. The trial court subsequently removed attorney D from four cases and attorney V from seven cases. However, because lawyers D and V did not inform the trial court exactly how many felony cases were in their inventory or how far they were over the twenty-case limit, these removals still did not put them in compliance with subsection (B)(3)(c)(i). Also, in addition to their public defender felony caseloads, both attorneys maintained substantial private practices, and the

¹⁵¹ *Wrinkles* at *2.

¹⁵² *Id.* at *15.

record is silent on the number of additional private felony cases that counsel carried during their representation of Wrinkles.

Further, the caseloads of lawyers D and V violated subsection (B)(3)(c)(ii) of Rule 24, which prohibits the assignment of new cases to the public defender within thirty days of a capital trial. Attorney D was assigned two public defender cases within thirty days of Wrinkles' trial, and attorney V was assigned five public defender cases within thirty days of Wrinkles' trial. Attorney V's caseload also violated subsection (B)(3)(c)(iii) of Rule 24, which specifies that none of the public defender's cases may be set for trial within fifteen days of the capital trial. Attorney V represented Bruce Anthony at trial on a felony battery charge on May 3, 1995, just eight days before voir dire in Wrinkles' case.¹⁵³

Mr. Wrinkles argued that these Rule 24 violations constituted ineffective assistance of counsel. The Court applied the two-prong *Strickland* test of deficient performance and resulting prejudice and found neither in this case. The Court pointed to the record showing that in preparation for trial both lawyers engaged in the following activities (record citations omitted):

met regularly to discuss the direction and progress of the case; met with Wrinkles several times before trial; interviewed witnesses; consulted numerous times with trial investigator Mark Mabrey, sentencing consultant and mitigation specialist Steven Brock, and neuropsychologist Dr. Eric Engum; consulted other experts including Paula Sites [Public Defender Council staff attorney]; sought discovery and filed multiple pretrial motions; prepared and filed briefs in support of various motions; prepared witnesses for trial; deposed approximately thirty potential witnesses; visited the crime scene; viewed videotapes and pictures of the crime scene; and read the police and autopsy reports. Attorney D's billing records reflect that he spent 319 hours on Wrinkles' case, and attorney V's billing records show that he spent 401 hours on Wrinkles' case. Both attorneys testified at the postconviction hearing that they spent more time on Wrinkles' case than they actually billed for. Norman Lefstein, Dean and Professor of Law at Indiana University School of Law-Indianapolis, testified as an expert on ineffective assistance of counsel and noted

¹⁵³ *Id.*

that the average time spent on a capital case that goes to jury trial through completion is 1,000 hours for two attorneys. He testified that that number varies depending on the complexity of the case.¹⁵⁴

Noting that the two lawyers spent more than 720 hours on a case in which the defendant confessed and that no deficient performance was apparent, the Court concluded that the postconviction court did not err in its determination that counsel were not ineffective based solely on their non-compliance with Criminal Rule 24.¹⁵⁵

The Public Defender Commission's county reimbursement guidelines provide an important incentive for compliance with Criminal Rule 24's mandates, given the Himalayan county costs associated with a capital case. As our Supreme Court stated in *Prowell*,

The rule is self-enforcing to the extent that the State may refuse to reimburse counties for attorney expenses if the requirements of Criminal Rule 24 are not met. The most obvious remedy is found within the rule itself, that is, refusing to compensate a county for attorneys' fees and expenses where the defense attorney is found to be in violation of the caseload limits prescribed by the rule without the court's permission. Presumably, the county would then penalize the lawyer who violated the rule by withholding payment for time spent on cases where the rule was violated. Experience suggests that lawyers are likely to observe rules if their paychecks depend on it.¹⁵⁶

Some counties have not applied for reimbursement for certain cases, but the vast majority of capital case expenses are reimbursed. Since the advent of the reimbursement guidelines, the 19 cases in which the death penalty was imposed have a range of reimbursements from \$6,110 to \$277,043.¹⁵⁷ The average reimbursement is

¹⁵⁴ *Id.* at *16-17.

¹⁵⁵ *Id.* at *17.

¹⁵⁶ *Prowell*, 741 N.E.2d at 716.

¹⁵⁷ Data in this paragraph and bar graphs on the following three pages are from Carusillo memo to Janeway (supra, note 73).

\$62,307. If the highest and lowest reimbursements are excluded the average reimbursement is \$52,981. For the 18 life without parole ("LWOP") cases, the range of reimbursements is from \$7,389 to \$143,258. The average reimbursement is \$57,373. If the highest and lowest reimbursements are excluded the average reimbursement for life without parole cases is \$55,129. For the 35 cases resulting in a term of years, the range of reimbursements is from \$4,053 to \$132,823. The average reimbursement is \$28,042. If the highest and lowest reimbursements are excluded the average reimbursement for a term of years is \$25,594. Bar graphs comprising the next three pages of this report illustrate the above three reimbursement ranges.

In reviewing the above data, or any other cost data for death penalty cases, it is important to keep in mind that each case is unique. For example, costs can vary depending on whether a case is tried or plead, and whether the plea comes early in the case or during trial. For further discussion on the variables connected with case costs, see this report's Section V "How the cost of a death penalty case compares to that of a case where the charge and conviction is life without parole."

C. Public Defense Fund

In 1989 at the same time the General Assembly created the Public Defender Commission, it also created the Public Defense Fund,¹⁵⁸ a state funded, nonreverting coffer dedicated to "receive court costs or other revenues for county reimbursement and administrative expenses."¹⁵⁹ Other states and the federal government have recognized the value of such a fund to the fair administration of justice.¹⁶⁰

¹⁵⁸ See IC 33-9-14 *et seq.*

¹⁵⁹ See IC 33-9-14-1 (As added by P.L.284-1989, Sec.5).

The Indiana Supreme Court's division of state court administration manages the Fund¹⁶¹ through the Indiana Public Defender Commission, which as noted above established the Fund's reimbursement guidelines. The General Assembly initially provided for an annual appropriation of \$650,000 for the Fund, in 1995 increased the appropriation to \$1.25 million, and in 1997 increased the appropriation to \$3 million. For the biennium beginning July 1, 1999, the General Assembly set the annual appropriation at \$2.4 million.¹⁶² These figures comprise the only state assistance given to Indiana's 92 counties for providing indigent defense services. Less than 20% of the annual appropriation is used for capital case reimbursement.¹⁶³

The county auditor initiates reimbursement for indigent capital defense services by submitting to the Indiana Public Defender Commission a written request outlining certified expenditures, according to the following:

A county auditor may submit on a quarterly basis a certified request to the public defender commission for reimbursement from the public defense fund for an amount equal to fifty percent (50%) of the county's expenditures for indigent defense services provided to a defendant against whom the death sentence is sought under IC 35-50-2-9.¹⁶⁴

If the Commission determines that the county auditor's request meets

¹⁶⁰ In June, 2000, Senator Richard Bray, Indiana Public Defender Commission member and Criminal Law Study Commission member, attended a United States Department of Justice symposium in Washington, D.C., where then-United States Attorney General Janet Reno referred to the Indiana reimbursement program as a model to be followed by other states. Annual Report, Indiana Public Defender Commission, 1999-2000, p. 5. After Illinois Governor Ryan issued his moratorium on the death penalty in Illinois, Illinois established a special fund to provide additional money to both public defenders and prosecutors for hiring more attorneys and investigators, and to pay for more thorough investigations. Editorial, *Fixing the Death Penalty*, CHICAGO TRIBUNE, 1A, Dec. 29, 2000.

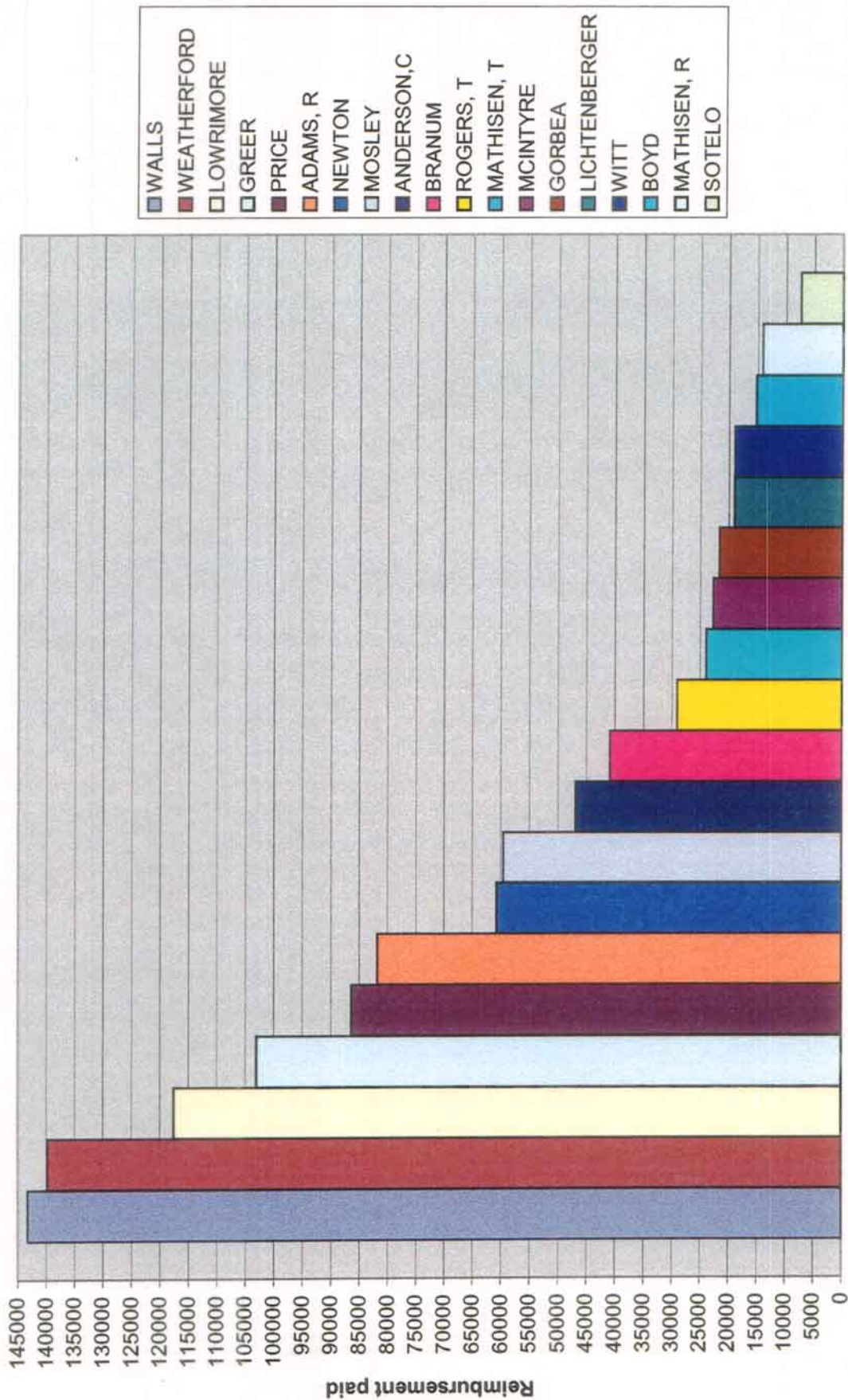
¹⁶¹ See IC 33-9-14-1 (As added by P.L.284-1989, Sec.5).

¹⁶² Indiana Public Defender Commission, Annual Report, 1999-2000, p. 5.

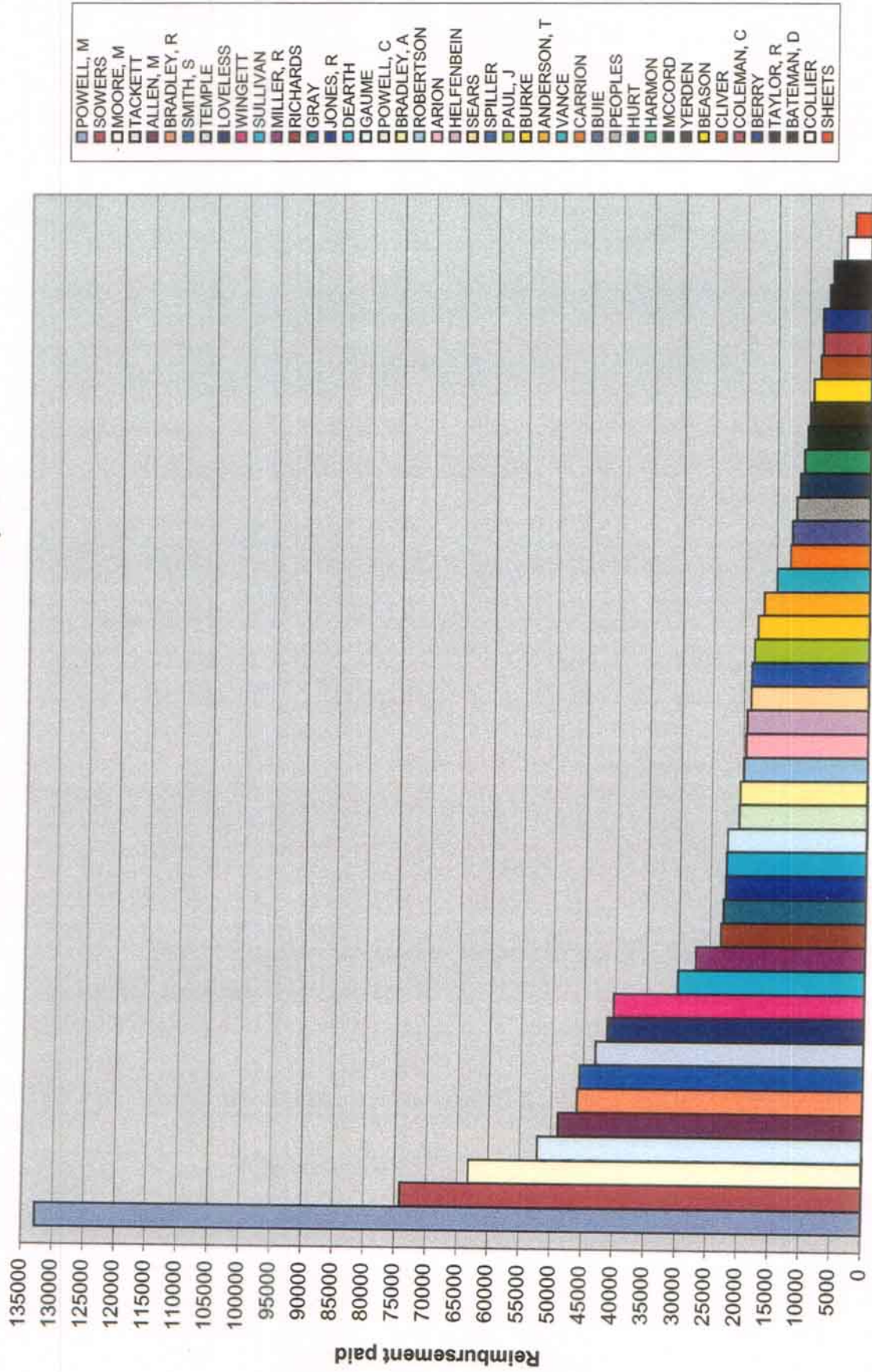
¹⁶³ Public Defender Commission staff attorney Thomas M. Carusillo's July 10, 2001, memorandum to Criminal Law Study Commission staff attorney Kathryn Janeway.

¹⁶⁴ IC 33-9-14-4.

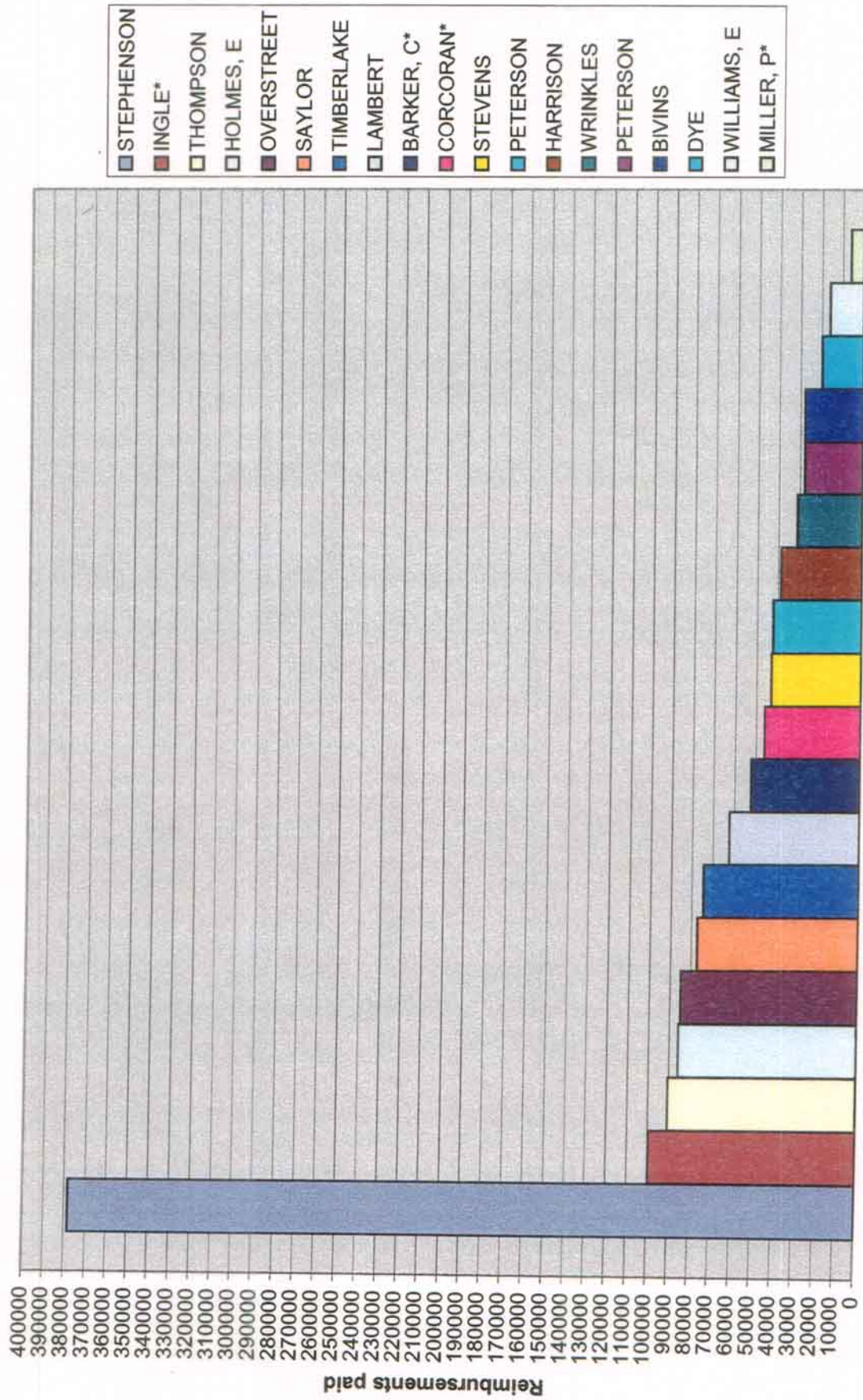
Cases in which LWOP Imposed



Cases in which Term of Years Imposed



Cases in which Death Penalty Imposed



Commission reimbursement guidelines, including compliance with Criminal Rule 24, the state court administrator certifies to the state auditor that the county should be paid 50% of the approved expenditures. Indiana Code § 33-9-14-4 outlines these provisions as follows:

(a) Except as provided under section 6 of this chapter, upon certification by a county auditor and a determination by the public defender commission that the request is in compliance with the guidelines and standards set by the commission, the commission shall quarterly authorize an amount of reimbursement due the county that is equal to fifty percent (50%) of the county's certified expenditures for indigent defense services provided for a defendant against whom the death sentence is sought under IC 35-50-2-9 The state court administrator shall then certify to the auditor of state the amount of reimbursement owed to a county under this chapter.

(b) Upon receiving certification from the state court administrator, the auditor of state shall issue a warrant to the treasurer of state for disbursement to the county of the amount certified.¹⁶⁵

Giving priority to capital defendants, the General Assembly has provided that if money in the Fund falls below a certain level, the Commission suspends reimbursements to counties for non-capital indigent defense expenditures until replenishment of the Fund at the next fiscal quarter, as provided by the following:

If the public defense fund would be reduced below two hundred-fifty thousand dollars (\$250,000) by payment in full of all county reimbursement for net expenditures in non-capital cases that is certified by the state court administrator in any quarter, the commission shall suspend payment of reimbursement to counties in non-capital cases until the next semi-annual deposit in the public defense fund. At the end of the suspension period, the state court administrator shall certify all suspended reimbursement. If the public defense fund would be reduced below two hundred-fifty thousand dollars (\$250,000) by payment in full of all suspended reimbursement in non-capital cases,

¹⁶⁵ IC 33-9-14-5.

the amount certified by the state court administrator for each county entitled to reimbursement shall be prorated.¹⁶⁶

D. Public Defender of Indiana

In addition to the work of the Public Defender Commission and the competency, training, workload, and compensation standards set by Criminal Rule 24, inmates with a capital sentence are provided counsel with the institutional expertise and resources of Indiana's office of the Public Defender.

In 1945 the Indiana General Assembly created the office of the Public Defender, one of the first of its kind in the nation. Some states, even those with high numbers of capital defendants, still have no institution comparable to that of the Public Defender of Indiana.¹⁶⁷ The Public Defender is a lawyer appointed to a four-year term by the Indiana Supreme Court, the enabling statute of which provides the following:

There is hereby created the office of Public Defender. The public defender shall be appointed by the Supreme Court of the state of Indiana to serve at the pleasure of said court, for a term of four (4) years. He¹⁶⁸ shall be a resident of the state of Indiana, and a practicing lawyer of this state for at least three (3) years. The Supreme Court is authorized to give such tests as it may deem proper to determine the fitness of any applicant for appointment.¹⁶⁹

The purpose of the public defender statute is to provide legal assistance at public expense for those who voluntarily seek and otherwise cannot afford to obtain the assistance of competent counsel.¹⁷⁰ The State Public Defender represents indigent

¹⁶⁶ IC 33-9-14-6.

¹⁶⁷ Regarding a proposal in Texas to create a public defender's office to better assist capital defendants: "A defender's office would have certain advantages, such as pooled resources and institutional knowledge." Steve Brewer and Mike Tolson, *Court-appointed defense: Critics charge the system is unfair*, THE HOUSTON CHRONICLE, Feb. 6, 2001.

¹⁶⁸ Although the language states "he," Indiana's Public Defender is and has been for several years a "she."

¹⁶⁹ IC 33-1-7-1.

¹⁷⁰ See *Fulton v. Schannen*, 64 N.E.2d 798, 224 Ind. 55 (1946).

inmates who are confined in any penal facility of the state in any postconviction proceeding after direct appeal remedies have been exhausted¹⁷¹ or following sentencing on a guilty plea, or in any proceeding before the department of corrections or parole board in which there is a right to counsel. In relevant part the statute provides that

(a) The state public defender shall represent any person confined in any penal facility of this state or committed to the department of correction due to a criminal conviction or delinquency adjudication who is financially unable to employ counsel, in any postconviction proceeding testing the legality of his conviction, commitment, or confinement, if the time for appeal has expired.

(b) The state public defender shall also represent any person committed to the department of correction due to a criminal conviction or delinquency adjudication who is financially unable to employ counsel, in proceedings before the department of correction or parole board, if the right to legal representation is established by law.¹⁷²

The Public Defender's Office is divided into two divisions, the (1) Appellate Division, and (2) the Postconviction Relief Division, consisting of the Non-Capital, Capital, and Juvenile Divisions.¹⁷³ In cases of a conflict of interest, such as matters involving co-defendants, the Public Defender contracts postconviction cases to qualified

¹⁷¹ "All but two states with the death penalty guarantee prisoners a lawyer for the full range of appeals allowed by the legal system. In Alabama and Georgia, however, there is no guarantee of a lawyer after the direct appeal of a conviction Thirty prisoners on Alabama's death row have no lawyers to pursue appeals, by far the largest such group in any state. The lack of appeals lawyers in Alabama is one reason the state has the fastest-growing death row in the country and the second-largest number of condemned prisoners per capita, after Nevada. With 188 people sentenced to die, Alabama has twice the percentage of condemned inmates per capita as Texas." David Firestone, *Inmates on Alabama's Death Row Lack Lawyers*, New York Times, June 16, 2001. "The system puts prisoners in the position of investigating new facts and presenting claims of legal error, which is a little tough if you're on death row," said Bryan Stevenson, executive director of the Equal Justice Initiative of Alabama, a nonprofit group that represents prisoners. *See id.*

¹⁷² IC 33-1-7-1.

¹⁷³ Public Defender of Indiana, 1999 Annual Report, 1.

private attorneys. These attorneys bill the Public Defender for their services, using the current fee schedule approved by our Supreme Court.¹⁷⁴

The Public Defender's Capital Division attorneys do not have primary responsibility for any non-capital cases,¹⁷⁵ enabling those attorneys to concentrate on and develop special skill and expertise in the area of capital litigation. In addition to seasoned attorneys, the Capital Division has seasoned investigators, mitigation specialists, law clerks, and support staff.¹⁷⁶ The Division's track record is impressive, as the following list shows - asterisks depict those sentences that are final, i.e., no chance of a capital sentence being re-imposed in the same case:

HISTORY OF RELIEF GRANTED IN CAPITAL PCR DIVISION CASES¹⁷⁷

1. Larry Williams - new sentencing phase ordered (term of years).*
2. Charles Smith - conviction and death sentence vacated (acquitted on retrial).*
3. James Harris - negotiated for a term of years at PCR hearing.*
4. Gary Burris - new sentencing phase ordered (resentenced to death and executed).
5. Rufus Averhart (a.k.a.Zolo Agona Azania) - new sentencing phase ordered (re-sentenced to death).
6. Russell Boyd - negotiated for term of years prior to PCR hearing.*
7. Frank Davis - new sentencing phase ordered (term of years).*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 10.

¹⁷⁶ *Id.* at 10.

¹⁷⁷ Information provided by Tom Hinesley of the office of the Public Defender of Indiana.

8. Gregory Van Cleave - vacated after PCR hearing (resentenced to term of years).*
9. Herb Underwood - conviction and sentence vacated on PCR (convicted, term of years imposed).*
10. Richard Moore - sentence vacated after PCR appeal (resentenced to death).
11. William Benirschke - negotiated for term of years prior to PCR hearing.*
12. William Spranger - new sentencing phase ordered (resentenced to term of years).*
13. James Games - new sentencing phase ordered (resentenced to term of years).*
14. Larry Potts - negotiated for term of years prior to PCR hearing.*
15. Greagree Davis (a.k.a. Chijioke Bomani Ben-Yisrayl) - PCR decision vacating the death sentence has been affirmed; rehearing denied.
16. Thomas Schiro - term of years imposed on successive PCR.*
17. Eric Holmes - new sentencing phase ordered after PCR hearing (sentence reinstated on appeal, rehearing pending).
18. Phillip McCollum - negotiated settlement while PCR appeal pending (120 year sentence imposed).*
19. Richard Huffman (Underwood's co-defendant) - conviction and death sentence vacated on PCR (resentenced to negotiated term of years).
20. Terry Spencer-Lowery - negotiated for term of years prior to PCR.
21. Johnny Townsend (McCollum's co-defendant) - negotiated settlement while PCR appeal pending.
22. Reynaldo Rondon (Martinez Chavez' co-defendant) - death sentence vacated on PCR appeal (negotiated term of years).

23. Vincent Prowell - Indiana Supreme Court reversed PCR denial, vacating conviction and sentence; State chose not to pursue capital punishment on retrial.

24. Walter Dye - PCR court reversed conviction and sentence; State is appealing, Dye cross-appealing.

E. The Public Defender Council

In addition to the Public Defender Commission, Criminal Rule 24, the Public Defense Fund, and the Office of the Public Defender, the quality of capital defense in Indiana is advanced by a specialized resource and advisory institution, Indiana's Public Defender Council. The Council's large defense attorney membership attests to its widely recognized value within the defense bar, and our Supreme Court factors utilization of Council expertise in determining effectiveness of counsel.¹⁷⁸

In 1977 the Indiana General Assembly created the Public Defender Council, a state judicial branch agency intended to provide support for attorneys who represent indigent defendants.¹⁷⁹ The Council's enabling statute provides as follows:

There is established a public defender council of Indiana. Its membership consists of all public defenders, contractual pauper counsel, and other court appointed attorneys regularly appointed to represent indigent defendants.¹⁸⁰

The Council has approximately 1000 member attorneys¹⁸¹ and an eleven-member board of directors comprised of the Public Defender and ten directors elected by the members as provided by the following:

The activities of the council shall be directed by an eleven member board of directors, ten of whom shall be elected

¹⁷⁸ See, e.g., *Wrinkles* at *16-17, in which our Supreme Court notes with assurance that defense counsel had the assistance of Public Defender Council capital defense advisor attorney Paula Sites.

¹⁷⁹ See IC 33-9-12 et. seq.

¹⁸⁰ IC 33-9-12-1.

¹⁸¹ Carusillo memo to Janeway (supra, note 73).

by the entire membership of the council. The public defender of Indiana shall also be a member of its board of directors.¹⁸²

Regarding funding, the Council has its own line item under Section 9 (Judicial) of the state budget,¹⁸³ and

may employ an executive director, staff, and clerical personnel as necessary to carry out its purposes.¹⁸⁴

The Council provides educational, technical, and research support for attorneys who represent indigent defendants, as provided by the following:

The council shall:

- (1) assist in the coordination of the duties of the attorneys engaged in the defense of indigents at public expense;
- (2) prepare manuals of procedure;
- (3) assist in the preparation of trial briefs, forms, and instructions;
- (4) conduct research and studies of interest or value to all such attorneys; and
- (5) maintain liaison contact with study commissions, organizations, and agencies of all branches of local, state, and federal government that will benefit criminal defense as part of the fair administration of justice in Indiana.¹⁸⁵

In carrying out this mandate with respect to capital defense, the Council produces and makes available to its membership a Death Penalty Defense Manual and an annual Death Penalty Defense Seminar and publishes regular reports in the *Indiana Defender* regarding developments affecting capital litigation at the trial and appellate

¹⁸² IC 33-9-12-2.

¹⁸³ Public Defender Commission staff attorney Thomas M. Carusillo's July 10, 2001, memorandum to Criminal Law Study Commission staff attorney Kathryn Janeway.

¹⁸⁴ IC 33-9-12-3.

¹⁸⁵ IC 33-9-12-4.

levels. The Council also provides consultation, research, and technical assistance in death penalty cases, including sample pleadings, networking with other attorneys experienced in similar cases, and referral to expert witnesses and mitigation investigators. The Council has an extensive list of publications and seminars available to defense attorneys.¹⁸⁶

The Council liaisons with study commissions, bar associations, and local, state, and federal government agencies regarding indigent defense services. The Council tracks all criminal justice legislation when the Indiana General Assembly meets in session and makes available information on specific bills. The Council also serves as a source of information about indigent defense delivery systems and assists courts, bar associations, and Council members in developing more effective and efficient defense delivery systems. The Council provides advice and technical assistance to public defender offices seeking to automate their organizations or install local area networks. The Council even provides free online legal research services to its membership.¹⁸⁷

F. Pre- versus Post- Rule 24 Eras

Having looked at several factors underlying the quality of defense counsel in Indiana, including the Public Defender Commission, Criminal Rule 24, the Public Defense Fund, the Office of the Public Defender, and the Public Defender Council, the cases discussed further below are those in which a successful claim of ineffective assistance of defense counsel formed the basis of capital sentence (and in some cases, conviction) reversal.¹⁸⁸

¹⁸⁶ Information found on the Public Defender Council's website, <http://www.state.in.us/pdc>, last visited on July 5, 2001.

¹⁸⁷ *Id.*

¹⁸⁸ Some of the reversals ultimately resulted in the reinstatement of the capital sentence on remand.

Since the 1977 reinstatement of Indiana's capital sentencing statute, 14 of Indiana's 86 capital sentences have been reversed due to ineffective assistance of counsel. Of those 14, 13 of the sentences were imposed during the 14-year period before 1992, the first year of Criminal Rule 24's operation. On the other hand, of the capital sentences imposed during the 10-year period since Rule 24's implementation, only one has been reversed due to ineffective assistance, and in that case defense counsel were also out of compliance with Criminal Rule 24 caseload restrictions.

The 13 pre-Rule 24 reversals often involve failure to investigate and present mitigating evidence at either the trial phase or the penalty phase, or both. A decision by defense counsel not to present evidence can be deemed reasonable only if it is "predicated on a proper investigation of the alleged defense."¹⁸⁹

[I]t is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned moral response to the defendant's background, character, and crime.' [Citations omitted.] In order to ensure 'reliability in the determination that death is the appropriate punishment in a specific case,' [citation omitted,] the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime.¹⁹⁰

Defense counsel's failure to investigate and present mitigating evidence can have a devastating effect on the outcome of a capital case. To avoid capricious imposition of a capital sentence, under federal constitutional jurisprudence states must

¹⁸⁹ *Smith v. State*, 547 N.E.2d 817, 821 (Ind. 1989).

¹⁹⁰ *Id.* at 821-22 (quoting *Penry v. Lynaugh*, 492 U.S. 302, —, 109 S.Ct. 2934, 2951, 106 L.Ed.2d 256, 284 (1989)).

delineate specific aggravating factors in their capital sentencing statutes in order to narrow the class of offenders eligible for the ultimate penalty.¹⁹¹ The same jurisprudence limits a State's ability to narrow the mitigating circumstances that sentencers may consider -- evidence that might cause sentencers to decline to impose a capital sentence.¹⁹² Indiana's capital sentencing statute delineates the following mitigating circumstances that may be considered in determining whether to impose a capital sentence:

- (1) The defendant has no significant history of prior criminal conduct.
- (2) The defendant was under the influence of extreme mental or emotional disturbance when the murder was committed.
- (3) The victim was a participant in or consented to the defendant's conduct.
- (4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.
- (5) The defendant acted under the substantial domination of another person.
- (6) The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.
- (7) The defendant was less than eighteen (18) years of age at the time the murder was committed.
- (8) Any other circumstances appropriate for consideration.

In 1978, capital defendant James Brewer, the first defendant prosecuted under the new Indiana death penalty statute, was tried for the robbery and murder of 29 year old Stephen Skirpan. Mr. Brewer had gained entry into the victim's home by

¹⁹¹ See *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

¹⁹² See *Penry v. Lynaugh*, 492 U.S. 302, —, 109 S.Ct. 2934, 2951, 106 L.Ed.2d 256, 284 (1989).

impersonating a police officer investigating a traffic accident and then robbed and shot the victim with a handgun. The jury reached a guilty verdict in short order, and the trial moved into the sentencing phase.

Although Brewer's counsel was an experienced criminal defense attorney, he was unaware, due to the newness of the law and its newly instituted bifurcated trial procedure, that the sentencing hearing would immediately follow the guilt phase. Upon learning that, defense counsel moved for a continuance of at least a week in order to collect his thoughts in preparation for the penalty phase and to follow up on new information regarding Mr. Brewer's extensive psychiatric history and problems that had begun in his boyhood. The trial court denied the motion because the jury was sequestered. So after spending approximately 200 hours preparing for the guilt phase, defense counsel's preparation for the penalty phase consisted of only "a couple of hours of discussion with Mr. Brewer."¹⁹³ The jury recommended death.

The federal district court granted a writ of habeas corpus due to ineffective assistance of counsel at the penalty phase, and the Seventh Circuit Court of Appeals affirmed, agreeing with the district court's finding that "there is a reasonable probability that [if the jury had been aware of Brewer's low I.Q. and deprived background, it] ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."¹⁹⁴ On remand, Mr. Brewer was sentenced to 55 years.

In 1980, capital defendant Richard D. Moore pled guilty to the shotgun shooting murders of his 27 year old former wife Rhonda L. Caldwell, who had divorced him the week before, Ms. Caldwell's 54 year old father John H. Caldwell, and a responding

¹⁹³ *Brewer v. Aiken*, 935 F.2d 850, 852, fn. 1 (7th Cir. 1991).

¹⁹⁴ *Id.* at 858.

police officer, 29 year old Gerald F. Griffin and was sentenced to death.¹⁹⁵ The postconviction court overturned Mr. Moore's conviction and sentence on grounds of ineffective assistance of counsel.¹⁹⁶ The state appealed only the conviction reversal. Our Supreme Court reversed the postconviction court, finding no ineffective assistance, and on remand after a new sentencing hearing, Mr. Moore's capital sentence was reinstated.

In 1981, a jury found capital defendant Gary Burris guilty of the shooting murder of 31 year old cab driver Kenneth W. Chambers, and a capital sentence was imposed. The evidence at trial showed that Mr. Burris planned and carried out the robbery of a cab driver. He called for a cab, and when Mr. Chambers arrived, Mr. Burris and his accomplices forced Mr. Chambers into the back seat, forced him to remove his clothing, tied his hands behind his back, robbed him of his cab fares, ordered him to lie naked on the January ground, and shot him in the head at point blank range.¹⁹⁷

The postconviction court overturned Mr. Burris's sentence on grounds of ineffective assistance of trial counsel, who referred to Mr. Burris as a "street person" and who failed to investigate and present mitigating evidence.¹⁹⁸ On remand after a new sentencing hearing, a hung jury had no recommendation and the trial court sentenced Mr. Burris to death.¹⁹⁹

In 1981, capital defendant Richard Dillon was on trial for the burglary and stabbing deaths of 72 year old William Hilborn and his wife, 65 year old Mary Hilborn. Mr. Dillon found himself represented by an attorney appointed only four months before

¹⁹⁵ See *Moore v. State*, 479 N.E.2d 1264 (Ind. 1985).

¹⁹⁶ See *Moore v. State*, 678 N.E.2d 1258 (Ind. 1997).

¹⁹⁷ See *Burris v. State*, 465 N.E.2d 171 (Ind. 1984).

¹⁹⁸ See *Burris v. State*, 558 N.E.2d 1067 (Ind. 1990).

¹⁹⁹ See *Burris v. State*, 642 N.E.2d 961 (Ind. 1994).

trial who had been licensed to practice law for a mere two and a half years. Not long before the trial was scheduled to take place, the attorney's wife filed for divorce, his brother was in a motorcycle accident, and his father had emergency heart surgery.²⁰⁰ The federal district court granted a writ of habeas corpus due to ineffective assistance of trial counsel. On remand Mr. Dillon pled guilty and received concurrent 60 year terms.²⁰¹

In 1982, a jury found capital defendant Zolo Agona Azania, formerly known as Rufus Lee Averhart, guilty of the shooting murder of 57 year old Gary Police Officer George Yaros. Finding trial counsel ineffective for failing to investigate and present mitigating evidence at sentencing, our Supreme Court reversed Mr. Averhart's capital sentence on appeal from the denial of postconviction relief and remanded for a new sentencing hearing.²⁰² On remand, the trial court reinstated the death penalty.

In 1983 a jury found capital defendant Russell Ernest Boyd guilty of the strangulation death of 30 year old Judith Falkenstein, and a capital sentence was imposed. Evidence at trial showed that Ms. Falkenstein's 10 year old daughter returned home from next door and found her mother nude and suspended from the bedroom dresser by a belt around her neck.²⁰³ The postconviction court vacated Mr. Boyd's capital sentence due to ineffective assistance of counsel, and the parties agreed to an 80 year sentence.

In 1983 a jury found capital defendant William J. Spranger guilty of the shooting murder of 31 year old police officer William Miner, who was responding to a call regarding a car being vandalized. The postconviction court vacated Mr. Spranger's

²⁰⁰ See *Dillon v. Duckworth*, 751 F.2d 895 (7th Cir. 1984).

²⁰¹ See Steve Stewart and the Indiana Prosecuting Attorneys Council, *Indiana Death Row 2000*, June 1, 2000, p. 142-43.

²⁰² See *Azania v. State*, 730 N.E.2d 646 (Ind. 2000).

²⁰³ See *Boyd v. State*, 494 N.E.2d 284 (Ind. 1986).

capital sentence due to ineffective assistance of trial counsel in failing to present mitigating evidence, including Mr. Spranger's psychological make-up, and in advising Mr. Spranger, despite strong evidence of guilt, to deny shooting the officer rather than to admit the shooting but deny that it was intentional.²⁰⁴ On remand, the judge imposed a 60 year sentence.

In 1983 a trial court convicted capital defendant Gregory Van Cleave, pursuant to his guilty plea, of the robbery and murder of 41 year old Robert Faulkner. Mr. Faulkner was outside on a ladder caulking his windows while watching the World Series on a television he had brought out with him. Mr. Van Cleave, intending to steal the television, shot Mr. Faulkner in the chest with a shotgun. The postconviction court vacated Mr. Van Cleave's death sentence due to ineffective assistance of counsel in advising the guilty plea. The state did not appeal the reversal of the death sentence and on remand a term of years was imposed.²⁰⁵

In 1983, a jury found capital defendant Charles Smith guilty of the robbery and murder of Carmine Zink in the parking lot of a restaurant. Our Supreme Court overturned the postconviction court's denial of relief, reversing Mr. Smith's sentence and conviction due to ineffective assistance of counsel. Mr. Smith's counsel had been employed February 5, 1983, but waited until three months before the September trial to attempt to locate and interview defense witnesses. No State's witnesses were ever interviewed or deposed by Mr. Smith's counsel. A key alibi witness was not contacted

²⁰⁴ See *Spranger v. State*, 650 N.E.2d 1117 (Ind. 1995).

²⁰⁵ Because the State did not appeal the sentence reversal, it remains a question as to whether the reversal was proper. But in reversing the postconviction court's reversal of Mr. Van Cleave's convictions, our Supreme Court noted that where a guilty plea is at issue, "in order to satisfy the 'prejudice' prong requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. . . . [t]he resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial," and found that here it would not have succeeded. *State v. Van Cleave*, 674 N.E.2d 1293, 1297 (Ind. 1996).

by counsel until the day before trial and was not listed on his pretrial alibi notice. At trial, counsel failed to impeach a witness, and, after soliciting a damaging polygraph remark from a witness, failed to move for mistrial, to strike, or to admonish the jury to disregard the polygraph remark.²⁰⁶ Counsel failed to tender, and the trial court failed to read, any jury instructions to the effect that an alibi is an affirmative defense under the law. Further, counsel tendered no jury instructions whatsoever during any phase of Mr. Smith's trifurcated proceeding.²⁰⁷

In general, most trial errors that do not justify reversal when taken separately do not attain reversible stature when taken together.²⁰⁸ However, in an ineffective assistance of counsel context, after each alleged error or omission is reviewed separately under *Strickland's* deficient performance prong, the reviewing court then assesses the cumulative prejudice to see whether the aggregate of counsel's errors rendered the trial's result unreliable, in satisfaction of *Strickland's* prejudice prong.²⁰⁹

In Mr. Smith's case, our Supreme court found that the combination of counsel's failure to move to exclude or prevent further references to the damaging polygraph evidence, his general lack of preparation, his failure to impeach damaging witnesses, and his failure to tender jury instructions comprised representation below the standard of reasonably competent trial counsel. Further, the Court found that counsel wholly failed to investigate and present mitigating evidence at the penalty phase, causing the Court to

²⁰⁶ Because of their inherent unreliability combined with their likelihood of unduly influencing a jury's decision, references by witnesses or counsel to polygraph test results are inadmissible absent waiver or stipulation of the parties. Where a trial hinges on a question of credibility, it is reversible error to deny a motion for mistrial after a damaging reference to polygraph results. *Smith v. State*, 547 N.E.2d 817, 821 (Ind. 1989).

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 820.

²⁰⁹ *Id.* at 820-21.

find him ineffective there, too.²¹⁰ As the Court noted regarding counsel's failures at sentencing,

Our statute requires the finder of fact to determine "that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances," Ind.Code § 35-50-2-9(e), (g), before arriving at a sentence of death. In the absence of any evidence of mitigating circumstances, which as discussed above may include virtually anything favorable to the accused, or of evidence to rebut the existence of the charged aggravating factors, a death sentence is a foregone conclusion.²¹¹

In 1984 a jury found capital defendant Chijoke Bomani Ben-Yisrayl, formerly known as Greagree C. Davis, guilty of the murder of 21 year old Debra A. Weaver, with aggravating circumstances of burglary, confinement, rape, and lying in wait. The evidence produced at trial showed that Mr. Ben-Yisrayl broke into Ms. Weaver's home, removed the light bulbs, and waited for her. When she arrived home, he attacked her. He bound and gagged her, then raped, sodomized, and stabbed her 113 times with two knives.²¹² Our Supreme Court affirmed the trial court's imposition of death, a sentence that the postconviction court reversed due to ineffective assistance of appellate counsel. Affirming that reversal, our Supreme Court held that appellate counsel performed deficiently by not challenging trial counsel's failure to present mitigation evidence at sentencing, warranting a new penalty phase, which has not yet taken place.²¹³

In 1984 a jury found capital defendant James Games guilty of the murder and robbery of 42 year old Thomas Ferree. The evidence produced at trial showed that Mr. Games tricked his way into Mr. Ferree's home, then attacked him with an assortment of

²¹⁰ *Id.* at 820-22.

²¹¹ *Id.* at 822.

²¹² See Steve Stewart and the Indiana Prosecuting Attorneys Council, *Indiana Death Row 2000*, June 1, 2000, p. 140-41.

²¹³ See *Ben-Yisrayl v. State*, 738 N.E.2d 253 (Ind. 2000).

knives, a meat cleaver, and a fireplace poker, stabbing and bludgeoning Mr. Ferree to death.²¹⁴ The postconviction court overturned Mr. Games' sentence due to ineffective assistance of counsel; the state did not appeal the sentence reversal.²¹⁵ On remand, the judge sentenced Mr. Games to 118 years.

In 1985, a jury found capital defendant Gorla Reynaldo Rondon guilty of the robbery and murder of 82 year old Francisco Alarcon, whom Mr. Rondon stabbed 15 times with a knife. On appeal from the denial of postconviction relief, our Supreme Court reversed Mr. Rondon's sentence due to ineffective assistance of counsel, whom the Court held failed to investigate and present mitigating evidence at the penalty phase.²¹⁶ On remand, a term of years was negotiated.

In 1991, a jury found capital defendant Perry S. Miller guilty of criminal deviate conduct and the rape, confinement, and murder of 19 year old convenience store clerk Christel Helmchen. The evidence produced at trial showed that Miller and his accomplices robbed at gunpoint and abducted Ms. Helmchen from her job. The men beat her, raped her vaginally with penises and anally with a tire iron, stabbed her breast and thigh with an ice pick, and then shot her in the head with a shotgun.²¹⁷

On appeal from the district court's habeas corpus denial, the Seventh Circuit Court of Appeals reversed Mr. Miller's conviction and sentence, finding trial counsel ineffective for "opening the door" for prosecutors to show on cross examination that Mr. Miller had previous convictions for kidnapping, rape, and sodomy. The Seventh Circuit also found that counsel should have obtained a hair analysis expert to challenge the

²¹⁴ See Stewart, *Indiana Death Row 2000*, 146-47.

²¹⁵ See *Games v. State*, 684 N.E.2d 466 (Ind. 1997), on rehearing, *Games v. State*, 690 N.E.2d 211 (Ind. 1997) (rehearing granted solely to clarify proper appellate standard of review of ineffective assistance claims).

²¹⁶ See *Rondon v. State*, 711 N.E.2d 506 (Ind. 1999).

²¹⁷ See Stewart, *Indiana Death Row 2000*, 169-70.

prosecution's claim that a pubic hair found on the victim's body almost certainly came from Mr. Miller.²¹⁸

To turn to the new Criminal Rule 24 era, the only capital sentence reversed due to ineffective assistance of counsel is the case of the 1994 sentencing and conviction of Vincent Juan Prowell, whose guilty plea, sentence, and conviction were reversed on appeal from the postconviction court's denial of relief. Our Supreme Court found ineffective assistance of counsel for failure to present mitigating evidence at sentencing, a failure that resulted at least in part from acts and omissions constituting violations of Indiana Criminal Rule 24.²¹⁹

Conclusion

To comply with a capital defendant's constitutional right to counsel, Indiana has developed an integrated complement of capital defense counsel guidelines and resources, including Criminal Rule 24, the Office of the Public Defender, the Public Defense Council, the Public Defender Commission, and the Public Defense Fund. By all indications, this five-part system successfully provides capital defendants with the qualified representation and substantial support services necessary to conduct a full defense.

First, Indiana Criminal Rule 24 governing appointed defense counsel competency, training, compensation, and workload standards has helped to ensure that a capital defendant's legal representation at trial and on appeal is properly qualified and has the time to devote to the case. Further, Rule 24 provides for two defense attorneys and any necessary support services such as paralegals, investigators, experts, lab tests

²¹⁸ See *Miller*, 255 F.3d 455.

²¹⁹ See *Prowell*, 741 N.E.2d 704.

and incidentals. Capital practitioners, both defense and prosecution, and capital trial judges alike report that Rule 24 has resulted in a high level of expertise and competence in Indiana capital defense counsel. Objective evidence of Rule 24's value appears in the fact that of the 14 Indiana capital sentences reversed due to ineffective assistance of counsel, 13 were imposed before the current Rule 24 was enacted. The one post-Rule 24 capital sentence reversal due to ineffective assistance involved violations of Rule 24.

Second, the office of the Public Defender provides seasoned capital defense counsel to indigent capital petitioners in postconviction proceedings. These experienced attorneys bring to bear the longstanding institutional expertise and resources of their office, and their effectiveness is best illustrated by their distinguished and highly competitive track record.

Third, the Public Defender Council provides advisory, educational, technical, and research support for capital defense attorneys. Since 1990, when the Indiana Supreme Court began requiring prosecutors to notify it each time prosecutors file a death penalty request, the Council has made this support available from the time the death penalty request is filed through the last stage of review. The quality of capital defense in Indiana has been and continues to be well advanced by this specialized, concentrated resource.

Fourth, the Public Defender Commission, through its county capital case reimbursement program, monitors Rule 24 compliance and thus assures that quality defense services are provided to indigent capital defendants. The Commission has the ear of the Indiana Supreme Court regarding capital defense guidelines and has been a good steward of the public trust in effectively managing the Public Defense Fund to maximize its value in providing effective capital defense.

Fifth, the Public Defense Fund is instrumental in providing adequate funding to develop and conduct a proper defense and in providing the monetary incentive for counties and defense attorneys to comply with Criminal Rule 24 standards.

The Commission finds that Indiana's special rules requiring definitively trained capital defense counsel are working to ensure that a capital defendant's legal representation is properly qualified. In so finding, the Commission recommends protecting this effective system by taking special care to ensure continual, adequate funding, through the Public Defense Fund, of the operation of Criminal Rule 24. And although the adequacy of the \$90/hour defense counsel compensation rate was challenged by some Commission members, the challenge was countered by other members and because no consensus was reached on the issue, determination of compensation rate is left, as in the past, to the Indiana Supreme Court.

III.

Whether the review procedures in place in Indiana and in our federal Seventh Circuit appellate courts result in a full and fair review of capital cases

In Indiana the following four levels of review apply to a capital conviction and sentence: 1) direct appeal to the Indiana Supreme Court; 2) petition for postconviction relief ("PCR") to the trial court and subsequent appeal of the PCR decision to the Indiana Supreme Court -- successive PCR petitions may be available; 3) petition for writ of habeas corpus to the federal district court and subsequent appeal of that decision to the Seventh Circuit Court of Appeals -- successive habeas petitions may be available; and 4) review by parole board and appeal to the Governor for clemency. The result from each avenue but the last is subject to review by the United States Supreme Court.

A. Direct Appeal to the Indiana Supreme Court

Indiana's review process begins immediately upon pronouncement of sentence. A motion to correct error may be filed requiring the trial court to review one or more errors. Indiana Trial Rule 59, "Motion to correct error" provides the following:

(A) Motion to correct error--When mandatory. A Motion to Correct Error is not a prerequisite for appeal, except when a party seeks to address:

(1) Newly discovered material evidence, including alleged jury misconduct, capable of production within thirty (30) days of final judgment which, with reasonable diligence, could not have been discovered and produced at trial; or

(2) A claim that a jury verdict is excessive or inadequate.

All other issues and grounds for appeal appropriately preserved during trial may be initially addressed in the appellate brief.

(B) Filing of motion. The motion to correct error, if any, may be made by the trial court, or by any party.

(C) Time for filing: Service on judge. The motion to correct error, if any, shall be filed not later than thirty (30) days after the entry of a final judgment or an appealable final

order. A copy of the motion to correct error shall be served, when filed, upon the judge before whom the case is pending pursuant to Trial Rule 5. The time at which the court is deemed to have ruled on the motion is set forth in T.R. 53.3.

(D) Errors raised by motion to correct error, and content of motion.

Where used, a motion to correct error need only address those errors found in Trial Rule 59(A)(1) and (2).

Any error raised however shall be stated in specific rather than general terms and shall be accompanied by a statement of facts and grounds upon which the error is based. The error claimed is not required to be stated under, or in the language of the bases for the motion allowed by this rule, by statute, or by other law.

(E) Statement in opposition to motion to correct error. Following the filing of a motion to correct error, a party who opposes the motion may file a statement in opposition to the motion to correct error not later than fifteen days after service of the motion. The statement in opposition may assert grounds which show that the final judgment or appealable final order should remain unchanged, or the statement in opposition may present other grounds which show that the party filing the statement in opposition is entitled to other relief.

(F) Motion to correct error granted. Any modification or setting aside of a final judgment or an appealable final order following the filing of a Motion to Correct Error shall be an appealable final judgment or order.

(G) Cross errors. If a motion to correct error is denied, the party who prevailed on that motion may, in the appellate brief and without having filed a statement in opposition to the motion to correct error in the trial court, defend against the motion to correct error on any ground and may first assert grounds for relief therein, including grounds falling within sections (A)(1) and (2) of this rule. In addition, if a notice of appeal rather than a motion to correct error is filed by a party in the trial court, the opposing party may raise any grounds as cross-errors and also may raise any reasons to affirm the judgment directly in the appellate brief, including those grounds for which a motion to correct error is required when directly appealing a judgment under Sections (A)(1) and (2) of this rule.

(H) Motion to correct error based on evidence outside the record.

(1) When a motion to correct error is based upon evidence outside the record, the motion shall be supported by affidavits showing the truth of the grounds set out in the motion and the affidavits shall be served with the motion.

(2) If a party opposes a motion to correct error made under this subdivision, that party has fifteen [15] days after service of the moving party's affidavits and motion, in which to file opposing affidavits.

(3) If a party opposes a motion to correct error made under this subdivision, that party has fifteen [15] days after service of the moving party's affidavits and motion, in which to file its own motion to correct errors under this subdivision, and in which to assert relevant matters which relate to the kind of relief sought by the party first moving to correct error under this subdivision.

(4) No reply affidavits, motions, or other papers from the party first moving to correct errors are contemplated under this subdivision.

(I) Costs in the event a new trial is ordered. The trial court, in granting a new trial, may place costs upon the party who applied for the new trial, or a portion of the costs, or it may place costs abiding the event of the suit, or it may place all costs or a portion of the costs on either or all parties as justice and equity in the case may require after the trial court has taken into consideration the causes which made the new trial necessary.

(J) Relief granted on motion to correct error. The court, if it determines that prejudicial or harmful error has been committed, shall take such action as will cure the error, including without limitation the following with respect to all or some of the parties and all or some of the errors:

(1) Grant a new trial;

(2) Enter final judgment;

(3) Alter, amend, modify or correct judgment;

(4) Amend or correct the findings or judgment as provided in Rule 52(B);

(5) In the case of excessive or inadequate damages, enter final judgment on the evidence for the amount of the proper damages, grant a new trial, or grant a new trial subject to additur or remittitur;

(6) Grant any other appropriate relief, or make relief subject to condition; or

(7) In reviewing the evidence, the court shall grant a new trial if it determines that the verdict of a non-advisory jury is against the weight of the evidence; and shall enter judgment, subject to the provisions herein, if the court determines that the verdict of a non-advisory jury is clearly erroneous as contrary to or not supported by the evidence, or if the court determines that the findings and judgment upon issues tried without a jury or with an advisory jury are against the weight of the evidence.

In its order correcting error the court shall direct final judgment to be entered or shall correct the error without a new trial unless such relief is shown to be impracticable or unfair to any of the parties or is otherwise improper; and if a new trial is required it shall be limited only to those parties and issues affected by the error unless such relief is shown to be impracticable or unfair. If corrective relief is granted, the court shall specify the general reasons therefor. When a new trial is granted because the verdict, findings or judgment do not accord with the evidence, the court shall make special findings of fact upon each material issue or element of the claim or defense upon which a new trial is granted. Such finding shall indicate whether the decision is against the weight of the evidence or whether it is clearly erroneous as contrary to or not supported by the evidence; if the decision is found to be against the weight of the evidence, the findings shall relate the supporting and opposing evidence to each issue upon which a new trial is granted; if the decision is found to be clearly erroneous as contrary to or not supported by the evidence, the findings shall show why judgment was not entered upon the evidence.

In that a motion to correct error is part of the trial process, Rule 24 governs counsel qualification standards and provision of services and incidentals on behalf of the defendant. As noted in this report's preceding section II, it was a belated motion to correct error that resulted in the reversal of Larry Hick's capital conviction.

Whether or not a motion to correct error is filed, the Indiana Supreme Court conducts a mandatory review of all capital sentences, pursuant to statute, and has exclusive jurisdiction over capital case appeals. Article 7, Section 4 of Indiana's constitution provides that "appeals from a judgment imposing a sentence of death shall be taken directly" to the Indiana Supreme Court. Indiana's capital sentencing statute requires our Supreme Court to review all capital sentences and mandates appellate priority of capital cases over all other cases, providing as follows:

A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The supreme court's review must take into consideration all claims that the:

- (1) conviction or sentence was in violation of the:
 - (A) Constitution of the State of Indiana; or
 - (B) Constitution of the United States;
- (2) sentencing court was without jurisdiction to impose a sentence; and
- (3) sentence:
 - (A) exceeds the maximum sentence authorized by law; or
 - (B) is otherwise erroneous.

If the supreme court cannot complete its review by the date set by the sentencing court for the defendant's execution under subsection (h), the supreme court shall stay the execution of the death sentence and set a new date to carry out the defendant's execution.²²⁰

²²⁰ Ind. Code § 35-50-2-9(j).

The direct appeal process begins immediately upon imposition of a capital sentence, when the trial court initiates on behalf of the convicted the appeal's prerequisites.²²¹ Criminal Rule 24 provides as follows:

When a trial court imposes a death sentence, it shall on the same day sentence is imposed order the court reporter and clerk to begin immediate preparation of the record of proceedings.²²²

If the convicted person cannot afford counsel, the trial court immediately appoints counsel to perfect the appeal. Regarding appointment of appellate counsel, Rule 24 provides as follows:

Upon a finding of indigence, the trial court imposing a sentence of death shall immediately enter a written order specifically naming counsel under this provision for appeal. . . .²²³

If qualified otherwise as appellate counsel, the attorney with the most experience and familiarity with the facts, circumstances, and procedural history of the case -- the convicted person's trial counsel -- is appointed as appellate counsel, as required by the following relevant portion of Criminal Rule 24:

. . . If qualified to serve as appellate counsel under this rule, trial counsel shall be appointed as sole or co-counsel for appeal.²²⁴

²²¹ Prior to Criminal Rule 24, no such safeguard was in place. In his presentation to the Commission at its October 2000 meeting, Tom Hinesley, Chief Deputy Public Defender for Capital Litigation in the Office of the Public Defender, noted that in 1978 Larry Hicks was within 2 weeks of execution before it was discovered that his case had not been appealed. Warden Jack Duckworth told two attorneys, who were at the prison on other business, about Mr. Hicks. The attorneys filed a motion to correct error and requested a new trial, which the trial court granted, finding that Mr. Hicks did not understand the prior proceedings. At the second trial key witnesses recanted their testimony, and Mr. Hicks was acquitted." Tom Hinesley, *Judicial Review of Death Sentences in Indiana - Office of the Public Defender of Indiana*, paper presented to the Criminal Law Study Commission at its October 2000 meeting, revised May 2001.

²²² Ind. Crim. Rule 24(I).

²²³ Ind. Crim. Rule (J).

²²⁴ Ind. Crim. Rule (J).

To qualify as appellate counsel, the attorney must meet certain minimum criminal litigation experience and specialized capital training standards in accordance with the following:

An attorney appointed to serve as appellate counsel for an individual sentenced to die, shall:

(a) be an experienced and active trial or appellate practitioner with at least three (3) years experience in criminal litigation;

(b) have prior experience within the last five (5) years as appellate counsel in no fewer than three (3) felony convictions in federal or state court; and

(c) have completed within two (2) years prior to appointment at least twelve (12) hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.²²⁵

As a further qualification for appointment as appellate counsel, the attorney must meet certain minimum workload standards to ensure that the attorney can devote adequate time to the appeal. Regarding the workload of appointed appellate counsel, Criminal Rule 24 provides as follows:

In the appointment of Appellate Counsel, the judge shall assess the nature and volume of the workload of appointed appellate counsel to assure that counsel can direct sufficient attention to the appeal of the capital case. In the event the appointed appellate counsel is under a contract to perform other defense or appellate services for the court of appointment, no new cases for appeal shall be assigned to such counsel until the Appellant's Brief in the death penalty case is filed."²²⁶

To ensure compensation sufficient to attract competent, effective capital appellate counsel practitioners, Criminal Rule 24 mandates a baseline hourly rate of \$90 per hour. The county that requested the capital sentence pays this expense, which is

²²⁵ Ind. Crim. Rule 24(J)(1)(a) - (c).

²²⁶ Ind. Crim. Rule 24(J)(2).

50% reimbursable by the Indiana Public Defender Commission if the county and counsel comply with the provisions of Criminal Rule 24. Regarding compensation of appellate counsel, Criminal Rule 24 provides as follows:

Appellate counsel appointed to represent an individual sentenced to die shall be compensated under this provision upon presentment and approval of a claim for services detailing the date, activity, and time duration for which compensation is sought. Counsel shall submit periodic billings not less than once every thirty (30) days after the date of appointment. Attorneys employed by appellate counsel for consultation shall be compensated at the same rate as appellate counsel.

(1) Hours and Hourly rate. Appellate defense counsel appointed on or after January 1, 2001, to represent an individual sentenced to die shall be compensated for time and services performed at the hourly rate of ninety dollars only for that time and those services determined by the trial judge to be reasonable and necessary for the defense of the defendant. The trial judge's determination shall be made within thirty (30) days after submission of billings by counsel. Counsel may seek advance authorization from the trial judge, ex parte, for specific activities or expenditures of counsel's time.

The hourly rate set forth above shall be subject to review and adjustment as set forth in section (C)(1) of this rule.

In the event the appointing judge determines that this rate of compensation is not representative of practice in the community, the appointing judge may request the Executive Director of the Division of State Court Administration to authorize payment of a different hourly rate of compensation in a specific case.

(2) Contract Employees. In the event appointed appellate counsel is generally employed by the court of appointment to perform other defense services, the rate of compensation set for such other defense services may be adjusted during the pendency of the death penalty appeal to reflect the limitations of case assignment established by this rule.

(3) Salaried Capital Public Defenders. In the event appointed appellate counsel is a salaried capital public defender, as described in section (C)(4) of this rule, the county must comply with, and counsel shall be

compensated according to, the requirements of section (C)(4).²²⁷

Appellate counsel is reimbursed for incidental expenses incurred in representing the appellant, in accordance with the following:

In addition to the hourly rate or salary provided in this rule, appellate counsel shall be reimbursed for reasonable incidental expenses as approved by the court of appointment.²²⁸

Issues available for consideration by the Indiana Supreme Court on direct appeal are those discernable from the face of the trial record of proceedings. The standard of review regarding factual determinations is deferential to the fact-finding role of the jury and the trial judge. Our Supreme Court will not reweigh factual determinations.²²⁹ Rather, the Court looks to the evidence and the reasonable inferences therefrom that support the trial court's judgment. Despite the Court's deference in that regard, the Court gives no deference to the application of the law to the facts. A recent decision illustrates this.

Evidence produced at trial showed that the marriage of John and Debbie Ingle was one of repeated domestic violence against Mrs. Ingle, whose many attempts to leave were met by Mr. Ingle's physical abuse, intimidating her into staying. When Mrs. Ingle finally left, Mr. Ingle stalked her for weeks using disguises and borrowed cars and kept her under constant surveillance. One day Mr. Ingle donned a disguise, loaded a handgun, and approached Mrs. Ingle at the restaurant where she worked with the plan of physically forcing her to return. When Mrs. Ingle screamed for her coworkers to call

²²⁷ Ind. Crim. Rule 24(K)(1) - (3).

²²⁸ Ind. Crim. Rule 24(K)(4).

²²⁹ "The credibility of an eyewitness or jailhouse snitch will not be second-guessed." Tom Hinesley, *Judicial Review of Death Sentences in Indiana - Office of the Public Defender of Indiana*, paper presented to the Criminal Law Study Commission at its October 2000 meeting, revised May 2001.

the police, Mr. Ingle shot her seven times, killing her, and then fled, shooting a police officer.²³⁰

The prosecution sought a capital sentence on the basis of two statutory aggravating factors, charging that Mr. Ingle killed his wife while attempting to take her hostage²³¹ and after "lying in wait."²³² On direct appeal, our Supreme Court concluded that the State proved neither aggravator and so a capital sentence was not permitted under Indiana law.²³³

In reaching that conclusion, the Court analyzed the arguments briefed by the state and the defense. The state argued that the appellant's attempt to remove Mrs. Ingle by force from the restaurant to convince her to reconcile with him constituted an attempt to make her his "hostage" under the kidnapping aggravator.²³⁴ The defense argued that a person is only a "hostage" if the person is confined or removed by the abductor in order to obtain something from a third party. Our Supreme Court looked to the intent of our legislature in the wording chosen for the kidnapping statute, noted the existence of a separate statute for criminal confinement, and also looked to definitions used by other states. The Court found that the appellant tried to obtain something from Mrs. Ingle, i.e., her promise to return to him, but sought nothing from a third party. For this reason, the Court found that Mrs. Ingle was not a "hostage."²³⁵

²³⁰ Steve Stewart, *Indiana Death Row 2000*, p. 154-55, June 1, 2000.

²³¹ See IC 35-50-2-9(b)(1)(E); IC 35-42-3-2.

²³² See IC 35-50-2-9(b)(3).

²³³ *Ingle v. State*, 746 N.E.2d 927 (Ind. 2001).

²³⁴ See IC 35-50-2-9(b)(1)(E); IC 35-42-3-2.

²³⁵ "We hold that the term 'hostage' in the Indiana kidnapping statute, Indiana Code § 35-42-3-2 (1993), refers to a person who is held as security for the performance or forbearance of some act by a third party. To the extent such a person is held solely to secure demands upon that person alone, the perpetrator may be guilty of criminal confinement, Indiana Code § 35-42-3-3 (1993), but not kidnapping." *Ingle v. State*, 746 N.E.2d 927, 939 (Ind. 2001).

The Court also found a failure of proof regarding the "lying in wait" aggravator.

The Court defined lying in wait thus:

Lying in wait involves the elements of watching, waiting, and concealment from the person killed with the intent to kill or inflict bodily injury upon that person. The concealment must be used as a direct means to attack or gain control of the victim, creating a nexus between the watching, waiting, and concealment and the ultimate attack.

We have characterized lying in wait as a crime in which there is considerable time expended in planning, stealth and anticipation of the appearance of the victim while poised and ready to commit an act of killing. Then when the preparatory steps of the plan have been taken and the victim arrives and is presented with a diminished capacity to employ defenses, the final choice in the reality of the moment is made to act and kill."²³⁶

The Court then found that although the appellant wore a disguise, he neither watched nor waited for Mrs. Ingle, but rather approached her directly; thus the appellant's actions did not fit Indiana's legal definition of lying in wait. The Court affirmed the appellant's convictions of murder and attempted murder and reversed his capital sentence due to insufficient evidence of the existence of either of the aggravating circumstances charged by the prosecution. Mr. Ingle will be resentenced.

If the appellant's conviction and sentence are affirmed, the appellant may petition the Indiana Supreme Court for a rehearing. If the Indiana Supreme Court denies the petition, which history shows is usually the case, the appellant may file a petition for writ of certiorari in the United States Supreme Court for a discretionary review and may file a petition for rehearing of that decision. Since the 1977 re-enactment of Indiana's death sentence statute, the Indiana Supreme Court direct appeal reversal rate is 21%²³⁷ and

²³⁶ *Ingle v. State*, 746 N.E.2d 927, 940 (Ind. 2001) [citations omitted].

²³⁷ *The Death Penalty in Indiana*, fact sheet compiled by the Indiana Public Defender Council and presented to the Commission at its July 2000 meeting.

no Indiana capital case has been granted review by the United States Supreme Court on direct appeal.²³⁸

The direct appeal example of capital offender Perry S. Miller is used here and in subsections below as a thread of cohesion to this report's section III regarding review, because Mr. Miller has been through all review avenues except the last, executive clemency. Mr. Miller was convicted of murder, conspiracy to commit murder, rape, criminal confinement, criminal deviate conduct, and robbery, the facts underlying which are outlined in Section I of this report. On direct appeal, Mr. Miller raised the following claims:

1. That the prosecutor's statements during closing argument constituted an improper attempt to imply that the prosecutor had information concerning Mr. Miller's guilt that was not placed into evidence;
2. That Indiana's capital sentencing statute is unconstitutional on its face or as applied;
3. That the evidence failed to support Mr. Miller's conviction for conspiracy to commit murder; and
4. That the evidence of Mr. Miller's sadistic tendencies and prior criminal conduct was improperly admitted into evidence.

Finding that his arguments did not prevail, our Supreme Court affirmed Mr. Miller's convictions and sentence.

B. Petition for Post-conviction Relief

The United States Supreme Court has suggested that states are constitutionally required to provide adequate state postconviction relief review for federal constitutional

²³⁸ Tom Hinesley, *Judicial Review of Death Sentences in Indiana - Office of the Public Defender of Indiana*, Paper presented to the Criminal Law Study Commission at its October 2000 meeting, revised May 2001.

claims that could not be properly pursued at trial and direct appeal.²³⁹ Federal habeas corpus law rewards states providing such review by giving great deference to state court adjudication of those claims. As a result, all states provide some form of state post-conviction review.²⁴⁰

Indiana adopted its Indiana Rules of Procedure for Post-Conviction Remedies in 1969. The rules

do not afford the convicted an opportunity for a 'super-appeal.' Rather, they create a narrower remedy for subsequent collateral challenges to convictions, challenges that must be based on the grounds enumerated in the post-conviction rules.²⁴¹

The PCR rules describe the grounds of relief thus:

- (1) that the conviction or the sentence was in violation of the Constitution of the United States or the constitution or laws of this state;
- (2) that the court was without jurisdiction to impose sentence;
- (3) that the sentence exceeds the maximum authorized by law, or is otherwise erroneous;
- (4) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
- (5) that his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint;
- (6) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error

²³⁹ State collateral proceedings are not *required* but are desired in order to minimize the necessity for resort to federal courts. *Case v. Nebraska*, 381 US 336 (1965) (vacating grant of certiorari because, pending ruling on merits, Nebraska instituted post-conviction review).

²⁴⁰ Tom Hinesley, *Judicial Review of Death Sentences in Indiana - Office of the Public Defender of Indiana*, paper presented to the Criminal Law Study Commission at its October 2000 meeting, revised May 2001.

²⁴¹ *Matheney v. State*, 688 N.E.2d 883, 890 (Ind. 1997) (citing *Weatherford v. State*, 619 N.E.2d 915 (Ind. 1993)).

heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy . . . ²⁴²

Thus, post-trial issues that can be presented at PCR proceedings include, but are not necessarily limited to, such claims as ineffective assistance of counsel, prosecutorial suppression of material evidence exculpatory to guilt or punishment, prosecutorial use of false testimony, jury misconduct, and newly-discovered evidence, such as DNA.²⁴³

PCR proceedings take place before the original trial judge. A petitioner initiates the review by filing a petition with the clerk of the court of conviction. No deposit or filing fee is required.²⁴⁴ The standard form of the petition "shall be available without charge from the Public Defender's Office and every penal institution in this State."²⁴⁵ Because the post-conviction judge is often the same judge who presided at the petitioner's original trial, the PCR rules allow a petitioner to request a change of judge, providing as follows:

[T]he petitioner may request a change of judge by filing an affidavit that the judge has a personal bias or prejudice against the petitioner. The petitioner's affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be accompanied by a certificate from the attorney of record that the attorney in good faith believes that the historical facts recited in the affidavit are true. A change of judge shall be granted if the historical facts recited in the affidavit support a rational inference of bias or prejudice. . . . ²⁴⁶

²⁴² Ind. Post-Conviction Rule 1 § 1(a).

²⁴³ Tom Hinesley, *Judicial Review of Death Sentences in Indiana - Office of the Public Defender of Indiana*, paper presented to the Criminal Law Study Commission at its October 2000 meeting, revised May 2001.

²⁴⁴ Ind. Post-Conviction Rule 1 § 2.

²⁴⁵ Ind. Post-Conviction Rule 1 § 3.

²⁴⁶ Ind. Post-Conviction Rule 1 § 4(b)

In PCR proceedings, the Public Defender of Indiana represents all capital sentenced indigent petitioners.²⁴⁷ Where a conflict of interest exists, e.g., capital sentenced co-defendants, the Public Defender contracts representation to private counsel at a rate of compensation consistent with Criminal Rule 24. The Attorney General represents the State.

Because PCR proceedings offer the petitioner an important opportunity to present evidence to a fact-finder, defense counsel must conduct a comprehensive investigation to ensure that all issues are litigated. PCR proceedings give the petitioner the only avenue to present claims that require factual development beyond what appears on the face of the trial (or guilty plea) record. The proceedings are meant to provide the petitioner with a vehicle for a full and fair review upon bona fide claims of illegality not reviewable on direct appeal.²⁴⁸ The petitioner and his counsel have approximately six months to prepare and file the initial PCR petition and one year to prepare the case for hearing.²⁴⁹

A PCR proceeding is a special quasi-civil remedy whereby a petitioner can ask the PCR trial court to hold a hearing regarding an error or new evidence that was not available or known at the time of the original trial or appeal.²⁵⁰ Because the proceedings are designed to provide an opportunity to raise issues not previously known or available, issues already decided on direct appeal are generally unavailable at PCR. The

²⁴⁷ Every petitioner who has received a capital sentence in recent years has been adjudicated as indigent. Tom Hinesley, *Judicial Review of Death Sentences in Indiana - Office of the Public Defender of Indiana*, paper presented to the Criminal Law Study Commission at its October 2000 meeting, revised May 2001.

²⁴⁸ *Lamb v. State*, 325 N.E.2d 180, 263 Ind. 137 (1975).

²⁴⁹ Tom Hinesley, *Judicial Review of Death Sentences in Indiana - Office of the Public Defender of Indiana*, paper presented to the Criminal Law Study Commission at its October 2000 meeting, revised May 2001.

²⁵⁰ See *McHugh v. State*, 471 N.E.2d 293 (Ind. 1984).

petitioner has the burden of proving his claims to the PCR court by a preponderance of the evidence.²⁵¹ Regarding the PCR hearing, the rules provide the following:

The petition shall be heard without a jury. A record of the proceedings shall be made and preserved. All rules and statutes applicable in civil proceedings including pre-trial and discovery procedures are available to the parties, except as provided above in Section 4(b). The court may receive affidavits, depositions, oral testimony, or other evidence and may at its discretion order the applicant [petitioner] brought before it for the hearing. The petitioner has the burden of establishing his grounds for relief by a preponderance of the evidence.²⁵²

The State may raise procedural bars to the petitioner's claims, asserting waiver (failure to timely raise or challenge under our court rules), *res judicata* (the issue was already judicially decided),²⁵³ laches (so much time has passed that the claim cannot be fairly challenged),²⁵⁴ or that the petitioner seeks to take advantage of a new rule of constitutional law in violation of the rule against retroactive application of new rules to final convictions.²⁵⁵ Generally if the court finds the existence of a procedural bar, then the merits of the claim are not reviewed. However, sometimes PCR counsel, or on PCR

²⁵¹ Ind. Post-Conviction Rule 1 § 5.

²⁵² Ind. Post-Conviction Rule 1 § 5.

²⁵³ *Res judicata* is "legalese" from Latin meaning "a thing adjudicated," or an issue that has already been definitively settled by judicial decision. See Black's Law Dictionary, Seventh Edition, West Group, St. Paul, Minn., p. 1312, 1999. See also *Canaan v. State*, 683 N.E.2d 227 (Ind. 1997), *rehg. denied, cert. denied* 118 S.Ct. 2064, 524 U.S. 906, 141 L.Ed.2d 141 (in postconviction proceedings, petitioner could not challenge admission of fingerprint evidence, where Supreme Court had held on direct appeal that fingerprints had been properly admitted and that thus that issue was *res judicata*).

²⁵⁴ "Laches" is legalese from French law and language meaning "remissness; slackness," or unreasonable delay or negligence in pursuing a claim in such a way that prejudices the party against whom relief is sought. Laches is raised as a defense to a claim when so much time has elapsed that a party's case is substantially prejudiced, e.g., witnesses are dead, their whereabouts unknown, or they are otherwise unavailable, or evidence has been lost or destroyed. See Black's Law Dictionary, Seventh Edition, West Group, St. Paul, Minn., p. 879, 1999.

²⁵⁵ Tom Hinesley, *Judicial Review of Death Sentences in Indiana - Office of the Public Defender of Indiana*, paper presented to the Criminal Law Study Commission at its October 2000 meeting, revised May 2001.

decision review our Supreme Court *sua sponte*, will recast a claim that is procedurally barred into an ineffective assistance of counsel claim so that the claim can be addressed on its merits.²⁵⁶

To effectuate a judgment granting relief and to facilitate appellate review, our PCR rules provide the following:

The court shall make specific findings of fact, and conclusions of law on all issues presented, whether or not a hearing is held. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to arraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper. This order is a final judgment.²⁵⁷

If the PCR court finds that the petitioner failed to prove his or her claims by a preponderance of the evidence, the petitioner can appeal that result to the Indiana Supreme Court, under the following PCR rule:

An appeal may be taken by the petitioner or the State from the final judgment in this proceeding, under rules applicable to civil actions. Jurisdiction for such appeal shall be determined by reference to the sentence originally imposed. The Supreme Court shall have exclusive jurisdiction in cases involving an original sentence of death....

On appeal of the denial of PCR, the petitioner must show that the evidence as a whole "leads unerringly and unmistakably to a decision opposite that reached by the trial court."²⁵⁸ The petitioner is appealing from a negative judgment, and our Supreme Court

²⁵⁶ See, e.g., *Ben-Yisrayl, f/k/a Christopher Peterson v. State*, 729 N.E.2d 102, 110 (Ind. 2000) (Ben-Yisrayl's failure to object at trial to jury instructions normally results in waiver of the instructional challenge on appeal; further, if an issue was known and available but not raised on direct appeal, it is normally waived. Ben-Yisrayl's failure to challenge the instructions both at trial and in his direct appeal resulted in a double waiver; yet our Supreme Court recast Ben-Yisrayl's instructional challenges as ineffective assistance of counsel in this appeal from PCR denial and reviewed the merits of the claims).

²⁵⁷ Ind. Post-Conviction Rule 1 § 6.

²⁵⁸ *Canaan v. State*, 683 N.E.2d 227, 228-229 (Ind. 1997).

will only reverse the PCR court's judgment if the evidence is without conflict and leads to one conclusion, yet the PCR court had reached the opposite conclusion.²⁵⁹

If the Indiana Supreme Court affirms the PCR court's denial of relief, the petitioner may ask our Supreme Court for a discretionary rehearing of the same matter. If the Court denies the request, which history shows it usually does, the petitioner may file a petition for writ of certiorari in the United States Supreme Court for a discretionary review, and may also file a petition for rehearing of that decision. Since the 1977 re-enactment of Indiana's death sentence statute, the United States Supreme Court has declined to review the merits of any Indiana capital PCR case.

Recent PCR appellate decisions have affirmed the capital sentences in, e.g., *Michael Daniels v. State*, 741 N.E.2d 1177 (Ind. 2001), *Michael Lambert v. State*, 743 N.E.2d 719 (Ind. 2001), and *Gerald Bivins v. State*, 735 N.E.2d 1116 (Ind. 2000). A recent PCR appellate decision has reversed the conviction and capital sentence, due to ineffective assistance of counsel, in *Prowell v. State*, 741 N.E.2d 704 (Ind. 2001). The prosecution has since dropped its capital sentence request regarding Prowell.

While the convicted does not have a right to litigate his case in perpetuity,²⁶⁰ our Supreme Court may allow the unsuccessful PCR petitioner to file successive petitions under the PCR rules,²⁶¹ which provide the following:

(a) A petitioner may request a second, or successive, Petition for Post-Conviction Relief by completing a properly and legibly completed Successive Post-Conviction Relief Rule 1 Petition Form in substantial compliance with the form appended to this Rule. Both the Successive Post-Conviction Relief Rule 1 Petition Form and the proposed successive petition for post-conviction relief shall be sent

²⁵⁹ *Johnson v. State*, 693 N.E.2d 941, 945 (Ind. 1998).

²⁶⁰ See *Greer v. State*, 321 N.E.2d 842, 262 Ind. 622 (1975).

²⁶¹ Ind. Post-Conviction Rule 1(12).

to the Clerk of the Indiana Supreme Court, Indiana Court of Appeals, and Tax Court.

(b) The court will authorize the filing of the petition if the petitioner establishes a reasonable possibility that the petitioner is entitled to post-conviction relief. In making this determination, the court may consider applicable law, the petition, and materials from the petitioner's prior appellate and post-conviction proceedings including the record, briefs and court decisions, and any other material the court deems relevant.

(c) If the court authorizes the filing of the petition, it is to be (1) filed in the court where the petitioner's first post-conviction relief petition was adjudicated for consideration pursuant to this rule by the same judge if that judge is available, and (2) referred to the State Public Defender, who may represent the petitioner as provided in Section 9(a) of this Rule. Authorization to file a successive petition is not a determination on the merits for any other purpose and does not preclude summary disposition pursuant to Section (4)(g) of this Rule.

There is no right to counsel in seeking to file a successive PCR petition; the right to counsel arises after the filing of the petition is authorized.²⁶² Our Supreme Court has approved two capital cases for successive PCR filing. The first case, on its third PCR petition and following full federal habeas review on the merits, resulted in a sentence reversal.²⁶³ The second case, *Zolo Agona Azania (f/k/a Rufus Averhart) v. State*, was recently approved, October 12, 2000, for its second PCR petition.

The rate of reversal pursuant to PCR proceedings from 1977-2000 is 32%.²⁶⁴

In 1993 the Indiana Supreme Court took several steps to expedite state court resolution of capital postconviction cases. First, the Court amended the rule governing

²⁶² Tom Hinesley, *Judicial Review of Death Sentences in Indiana - Office of the Public Defender of Indiana*, presentation to the Criminal Law Study Commission at its October 2000 meeting, revised May 2001.

²⁶³ *Schiro v. State*, 669 N.E.2d 1357 (Ind. 1996).

²⁶⁴ *The Death Penalty in Indiana*, fact sheet compiled by the Indiana Public Defender Council and presented to the Commission at its July 2000 meeting.

successive petitions for postconviction relief, Indiana Post-Conviction Rule 1(12). Previously, a successive petition was filed, like an original petition, in the trial court. The amended rule requires that all successive petitions be sent to the Clerk of the Indiana Supreme Court and the Indiana Court of Appeals for initial review. If the appellate court authorizes the successive petition, the petition is referred to the Public Defender of Indiana.

Also in 1993 our Supreme Court began ordering capital postconviction trial courts to 1) submit a proposed schedule, subject to our Supreme Court's approval, for bringing capital cases to hearing and final judgment within a specified time period, generally 9-14 months; and to 2) continue such proceedings only with our Supreme Court's approval. In cases where no petition has yet been filed, the trial court must set an execution date unless a petition is filed within 60 days.

Indiana Criminal Rule 24(H) ensures expeditious litigation of capital post-conviction cases by providing the following:

[W]ithin thirty (30) days following completion of rehearing (of direct appeal proceedings), private counsel retained by the inmate or the State Public Defender (by deputy or by special assistant in the event of a conflict of interest) shall enter an appearance in the trial court, advise the trial court of the intent to petition for post-conviction relief, and request the Supreme Court to extend the stay of execution of the death sentence. A copy of said appearance and notice of intent to file a petition for post-conviction relief shall be served by counsel on the Supreme Court Administrator. When the request to extend the stay is received, the Supreme Court will direct the trial court to submit a case management schedule consistent with Ind.Code § 35-50-2-9(i) for approval. On the thirtieth (30th) day following completion of any appellate review of the decision in the post-conviction proceeding, the Supreme Court shall enter an order setting the execution date.

Under the case management schedules approved by our Supreme Court, the capital PCR petitioner generally has about 6 months to file a petition and one year to prepare for hearing, with the judgment rendered shortly thereafter. Hearing and judgment dates cannot be continued without our Supreme Court's approval. Appellate time lines govern appeals of PCR decisions. When rehearing is denied, our Supreme

Court sets an execution date, subject to a valid stay by the federal court. That date and the one year statute of limitations for filing federal habeas petitions reduces delay at the conclusion of state postconviction proceedings.

As an illustration of issues available for PCR proceedings, we turn to our example case of Perry Miller. On PCR Mr. Miller claimed that both his trial counsel and his appellate counsel were ineffective, and that he had not received meaningful appellate review of his sentence on direct appeal. He claimed that his trial counsel was ineffective for the following reasons:

1. failing to move to continue the trial;
2. failing to retain particular expert witnesses, including one to rebutt the state's hair analysis expert;
3. making particular statements to jurors;
4. the manner in which he cross-examined and rebutted state witnesses;
5. opening the door for the state's introduction of Mr. Miller's sadistic tendencies and prior criminal conduct;
6. failing to present additional mitigating evidence at sentencing; and
7. failing to instruct the jury on residual doubt.

Mr. Miller claimed that his appellate counsel was ineffective for failing to make specified arguments on appeal. Neither ineffective assistance claim prevailed and the trial court denied relief. On appeal from that denial, our Supreme Court affirmed the PCR court's decision, and Mr. Miller's convictions and sentence were again affirmed.

Recall that on direct appeal Mr. Miller unsuccessfully argued that the trial court improperly admitted evidence of Mr. Miller's sadistic tendencies and prior criminal conduct. To avoid *res judicata* on PCR Mr. Miller recharacterized the issue as ineffectiveness of counsel, arguing that such evidence should not have come in at trial and that it would not have had his counsel been effective.

D. Federal Habeas Corpus Review

Through habeas corpus review, federal courts provide an exclusive remedy for a state prisoner to collaterally challenge his or her conviction and seek release.²⁶⁵ The prisoner may file a petition for writ of habeas corpus in the district court where the prisoner is in custody (Northern District of Indiana) or the district where the prisoner was convicted and sentenced (either the Northern or Southern District of Indiana). The United States Code provides the following:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.²⁶⁶

The purpose of a writ of habeas corpus is to contest the legality of the incarceration, not the petitioner's guilt or innocence. The Code provides that the writ is not available to a prisoner unless one of the following conditions are met:

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

²⁶⁵ The United States Constitution provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2; *see generally Wright v. West*, 505 U.S. 277, 285-90 (1992) (historical development of habeas corpus law).

²⁶⁶ 28 U.S.C.A. § 2241.

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.²⁶⁷

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), habeas courts may only review claims in which state supreme courts unreasonably applied United States Supreme Court precedent, except if the petitioner can show with the existing evidence that he is actually innocent and that no reasonable juror could have found the petitioner to be guilty. This exception entitles the petitioner to habeas review regardless of whether the state supreme court unreasonably applied United States Supreme Court precedent. Habeas may not be used to assert ineffectiveness of counsel at the PCR stage.²⁶⁸ Nor may habeas be used to assert a claim, based on new evidence, of factual innocence.²⁶⁹

Only claims raised in state court are available for federal habeas review. In reviewing habeas claims, federal courts may not grant relief if the claim was waived in state court or if the issue was not presented or properly presented in state court.

Despite its apparent narrowness of review, a few examples illustrate that nonetheless habeas proceedings are used to adjudicate a variety of claims. Habeas has

²⁶⁷ 28 U.S.C.A. § 2241.

²⁶⁸ 28 U.S.C. 2254(i).

²⁶⁹ See *Herrera v. Collins*, 506 U.S. 390 (1993)(noting that "the traditional remedy for claims of innocence based on newly discovered evidence, discovered too late in the day to file a new trial motion, has been executive clemency").

been used, e.g., to challenge the prosecution's exercise of peremptory strikes as impermissible based on race in violation of the Equal Protection Clause,²⁷⁰ to challenge a jury verdict if involuntary post-Miranda statements were admitted at trial for impeachment purposes,²⁷¹ to challenge a conviction after the petitioner established a bona fide doubt as to his competency to stand trial,²⁷² and to assert a Brady violation arising from the prosecution's alleged nondisclosure of material evidence.²⁷³ Habeas has been used to assert, e.g., ineffective assistance of counsel during the pre-trial stage of proceedings,²⁷⁴ the trial stage,²⁷⁵ the sentencing stage,²⁷⁶ or based on a conflict of interest.²⁷⁷

Petitioners unable to pay the filing fee may apply for permission to file the petition *in forma pauperis*²⁷⁸ by filing a special affidavit. Petitions must closely approximate the format prescribed by federal or local rules and must state with specificity the grounds for the requested relief. Despite the requirements for specificity and particularity, *pro se*²⁷⁹

²⁷⁰ See *Coulter v. Gilmore*, 155 F.3d 912, 918-19 (7th Cir. 1998).

²⁷¹ See *Henry v. Kernan*, 177 F.3d 1152, 1158-59 (9th Cir.), amended by 197 F.3d 1021 (9th Cir. 1999).

²⁷² See *Barnett v. Hargett*, 174 F.3d 1128, 1136 (10th Cir. 1999).

²⁷³ See *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999).

²⁷⁴ See *Tucker v. Prelesnik*, 181 F.3d 747, 756 (6th Cir. 1999) (failure to obtain favorable evidence and request continuance).

²⁷⁵ See *Steinkuehler v. Meschner*, 176 F.3d 441, 445 (8th Cir. 1999).

²⁷⁶ See *Lamb v. Johnson*, 179 F.3d 352, 356 (5th Cir. 1999) (failure to investigate and present mitigators).

²⁷⁷ See *Wilson v. Moore*, 178 F.3d 266, 280 (4th Cir. 1999).

²⁷⁸ *In forma pauperis* is legalese from Latin meaning "in the manner of a pauper," or in the manner of an indigent who is permitted to disregard filing fees and court costs. See *Black's Law Dictionary*, Seventh Edition, West Group, St. Paul, Minn., p. 783, 1999.

²⁷⁹ *Pro se* is legalese from Latin meaning "for oneself" or "on one's own behalf," or one who proceeds in court without the assistance of a lawyer. See *Black's Law Dictionary*, Seventh Edition, West Group, St. Paul, Minn., p. 1236-37, 1999.

petitions “are [held to] less stringent standards than formal pleadings drafted by lawyers.”²⁸⁰

AEDPA establishes a one-year limitation on filing habeas petitions.²⁸¹ Prior to the passage of AEDPA, no deadline existed for filing a habeas action. But effective April 1996, an inmate seeking habeas review has one year from the finality of direct appeal to file a habeas petition. The one-year period runs from the latest of the following situations: (1) final judgment on direct review or “the expiration of the time for seeking such review;” (2) the removal of any state imposed impediment that unconstitutionally prevented the filing of such a petition; (3) the United States Supreme Court’s recognition of a new, retroactively applicable constitutional right; or (4) the emergence or recognition of any new facts supporting the petitioner’s claim that “could have been discovered through the exercise of due diligence.”²⁸²

The one-year time limit is tolled during PCR proceedings, from the time of filing the PCR petition through the PCR appellate decision. A portion of that year is inevitably expended preparing the PCR petition by new counsel previously unfamiliar with the case. And the balance is then available for new habeas counsel to prepare a new habeas petition.

AEDPA provides for a faster time period – a 180-day limitation applies to certain capital cases if a state “opts in” for that provision by meeting certain counsel standards. No state to date has successfully opted in due to the high bar of those standards.²⁸³

²⁸⁰ *Antonelli v. Sheahan*, 81 F.3d 1422, 1427 (7th Cir. 1996); *see also Coulter v. Gramley*, 93 F.3d 394, 397 (7th Cir. 1996) (*pro se* petition improperly addressing quality of *Batson* hearing in state court construed liberally to present substantive *Batson* claim).

²⁸¹ Antiterrorism and Effective Death Penalty Act of 1996, §§ 101, 110, Stat. 1217, 1220 (1996) (codified at 28 U.S.C. § 2244(d) (2000)).

²⁸² 28 U.S.C. § 2244(d).

²⁸³ *See id.* § 2263.

State PCR defense counsel assist in obtaining representation for federal habeas petitioners, and the federal courts are responsible for compensating these lawyers. The Indiana Attorney General represents the Indiana State Prison superintendent, who is the designated defendant²⁸⁴ in these proceedings because the State Prison houses capital prisoners.²⁸⁵ Both the Northern and Southern Districts of Indiana generally compensate appointed habeas capital defense counsel at an hourly rate of \$125.

Regarding standard of review, federal courts will not grant habeas relief on a claim already adjudicated in state court proceedings unless that adjudication can be shown to be unreasonably wrong.²⁸⁶ Factual findings by the state court are presumed to be correct.²⁸⁷ Evidentiary hearings are held if the prisoner meets certain standards.²⁸⁸

An Indiana petitioner may appeal the district court's decision to the 7th Circuit Court of Appeals if a federal judge decides that the petitioner has made a substantial showing of the denial of a constitutional right.²⁸⁹ If that appeal is unsuccessful, the

²⁸⁴ See 28 U.S.C.A. § 2254.

²⁸⁵ Thus, at the review stages of (1) direct appeal, (2) PCR, and (3) habeas corpus, an indigent, capital-sentenced person is typically represented by, respectively, (1) a Public Defender Commission-trained, Criminal Rule 24-qualified counsel, (2) the Public Defender of Indiana, and (3) federally-appointed counsel. At those same three review stages, the State is represented each time by the Attorney General of Indiana.

At the Commission's October 2000 meeting, then-Attorney General of Indiana Karen Freeman-Wilson discussed her office's responsibility for prosecuting death penalty cases from beginning to end, not only by handling capital conviction and sentence reviews at the direct appeal, PCR, and federal habeas corpus levels, but also by assisting prosecutors at the charging, pre-trial, and trial stages, helping to minimize error. She contrasted the gravity of this responsibility with victims' stories that often seem lost post-trial in the focus on the rights and fate of the defendant, noting that a defendant who has received a capital sentence is one who by definition has perpetrated a heinous crime against a victim whose voice can only be heard through surviving family, prosecutors, and attorneys general.

²⁸⁶ See 28 U.S.C. 2254(d)(1).

²⁸⁷ See 28 U.S.C. 2254(e)(1).

²⁸⁸ See 28 U.S.C. 2254(e)(2).

²⁸⁹ See 28 U.S.C. 2253.

petitioner can file a petition for writ of certiorari in the United States Supreme Court for a discretionary review.²⁹⁰ A successive habeas petition may be reviewed under certain conditions.²⁹¹

From 1977 through May 2000, 29% of Indiana capital sentences were reversed through habeas corpus proceedings.²⁹² This figure does not include the recent capital sentence reversals in *Minnick v. Anderson*, 151 F.Supp.2d 1015 (N.D.Ind., August 22, 2000), where the capital sentence had been imposed over a unanimous jury recommendation against death, and *Roche v. Anderson*, 132 F.Supp.2d 688 (N.D.Ind. 2001).²⁹³

Returning to our review example case of Mr. Miller, recall that on direct appeal Mr. Miller unsuccessfully argued that the trial court improperly admitted evidence of Mr. Miller's sadistic tendencies and prior criminal conduct. To avoid *res judicata* on PCR Mr. Miller recharacterized the issue as ineffectiveness of counsel, arguing that such evidence should not have come in at trial and that it would not have had his counsel been effective. The argument failed before the PCR court and our Supreme Court on review of the PCR court's decision. On habeas Mr. Miller made the same ineffective assistance argument, which failed at the district court but prevailed on the Seventh Circuit's review of the district court's decision, resulting in an order for his retrial or

²⁹⁰ Since the 1977 re-enactment of Indiana's capital sentencing statute, the United States Supreme Court has reviewed one Indiana capital case on its merits. See *Thomas Schiro v. Farley*, 510 U.S. 222 (1994).

²⁹¹ See 28 U.S.C. 2244(b).

²⁹² *The Death Penalty in Indiana*, fact sheet compiled by the Indiana Public Defender Council and presented to the Commission at its July 2000 meeting.

²⁹³ Tom Hinesley, *Judicial Review of Death Sentences in Indiana - Office of the Public Defender of Indiana*, paper presented to the Criminal Law Study Commission at its October 2000 meeting, revised May 2001.

release. Mr. Miller then negotiated a plea bargain in which he and the state agreed to a sentence of a term of years.

D. Executive Clemency

The fourth avenue of review for relief in a capital case is executive clemency. The Indiana Constitution provides that "[t]he Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law."²⁹⁴

An inmate initiates a clemency proceeding by filing an application for clemency with the Indiana Parole Board²⁹⁵ as provided by the following:

An application to the governor for commutation of sentence, pardon, reprieve, or remission of fine or forfeiture shall be filed with the parole board. The application must be in writing and signed by the person seeking gubernatorial relief or by a person on his behalf. The board may require the applicant to furnish information, on forms provided by the parole board, that it considers necessary to conduct a proper inquiry and hearing regarding the application.²⁹⁶

Upon receiving an application for clemency, the Parole Board must notify the next of kin of the victim of the petitioner's crime and must

[c]onduct an investigation, which must include the collection of records, reports, and other information relevant to consideration of the application; [and]

[c]onduct a hearing where the petitioner and other interested persons are given an opportunity to appear and present information regarding the application. The hearing may be conducted in an informal manner without regard to formal rules of evidence.²⁹⁷

²⁹⁴ IND. CONST. ART. V, § 17 (amended 1984).

²⁹⁵ See IC 11-9-2-1; see also, *Dye v. State*, 717 N.E.2 5, 20, n. 19 (Ind. 1999).

²⁹⁶ IC 11-9-2-1.

²⁹⁷ See IC 11-9-2-2(b)(2) and (3).

After the hearing, the Parole Board submits its recommendation to the Governor, which the Governor reviews before making his decision.²⁹⁸

Indiana has no provision for compensating defense counsel for clemency proceedings. However, on April 13, 2001, relying on 21 U.S.C. 848(q)(8), a federal district court in Indiana ruled that counsel for a petitioner may be entitled to compensation in clemency proceedings if (1) a non-frivolous federal habeas petition had been exhausted, (2) no state provision for clemency counsel existed, and (3) the petition requesting clemency counsel is filed before counsel provides clemency services.²⁹⁹

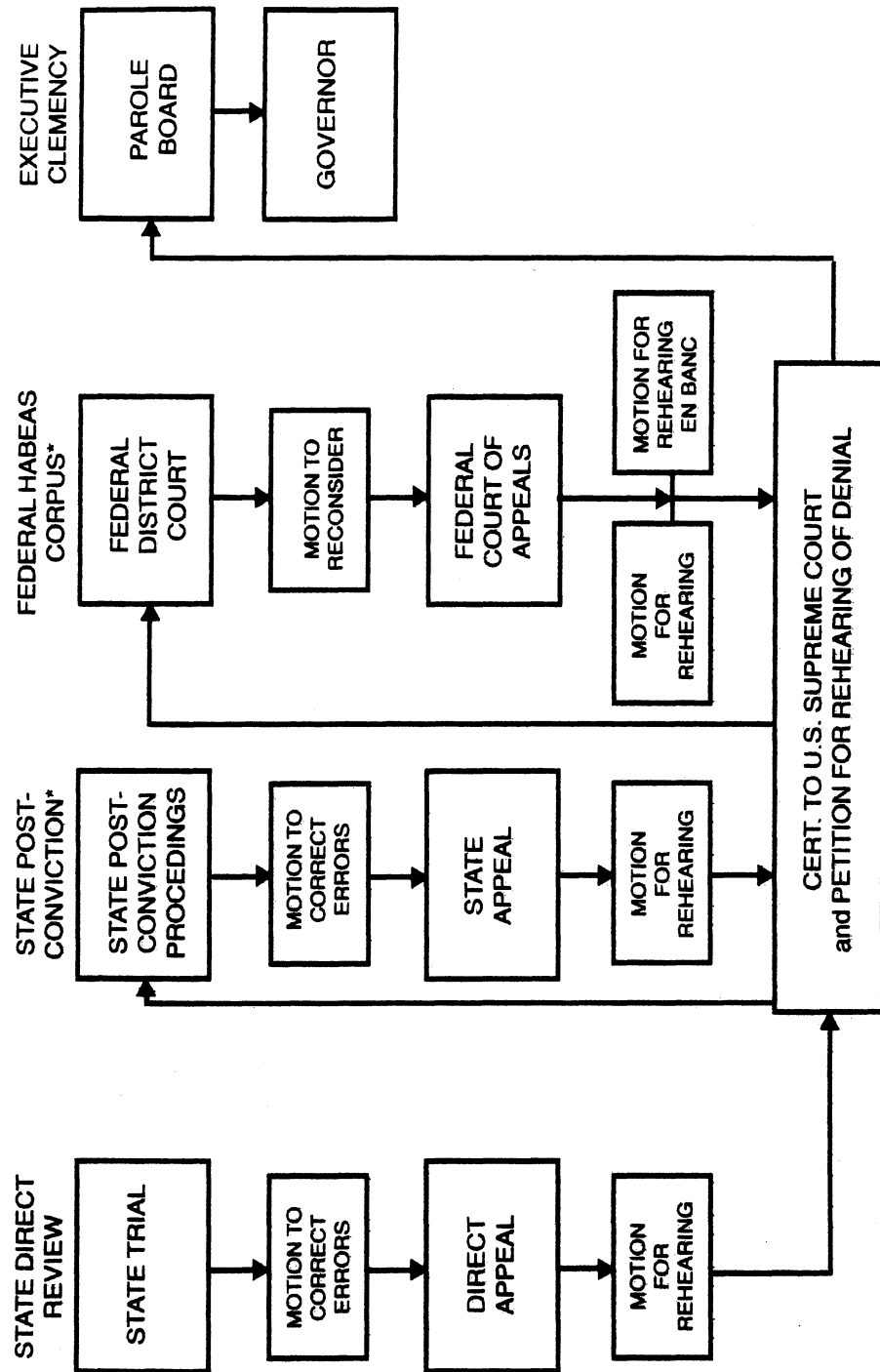
Since the 1977 re-enactment of Indiana's capital sentence statute, no petition for executive clemency has been granted in a capital case.³⁰⁰

²⁹⁸ IC 11-9-2-2(b).

²⁹⁹ See Judge David Hamilton's "Entry on Petitioner's Motion for Appointment of Counsel for State Clemency Proceedings," p. 4, *Jim Lowery v. Rondle Anderson*, Cause No. IP 96-71-CH/G.

³⁰⁰ Tom Hinesley, *Judicial Review of Death Sentences in Indiana - Office of the Public Defender of Indiana*, paper presented to the Criminal Law Study Commission at its October 2000 meeting, revised May 2001.

Indiana's Capital Review Process



*Successive postconviction and federal habeas proceedings are available in some circumstances.

Conclusion

In Indiana, the following four avenues of review apply to a capital sentence: 1) direct appeal to the Indiana Supreme Court; 2) petition for post-conviction relief ("PCR") to the trial court and subsequent appeal of the PCR decision to the Indiana Supreme Court -- successive petitions for PCR may be available; 3) petition for writ of habeas corpus to the federal district court and subsequent appeal of that decision to the Seventh Circuit Court of Appeals -- successive habeas petitions may be available; and 4) appeal to the Governor for clemency. The result of each avenue of review but the last is subject to review by the United States Supreme Court.

Each of the four avenues of capital case review has within it multiple opportunities for potential reexamination. However, some of these opportunities are more meaningful than others. Thus, a defendant may choose not to attempt some available opportunities because they are rarely granted, e.g., petitions for rehearing.

The first review avenue, state direct review, provides within it five opportunities for reexamination. First, on direct review, a motion to correct errors may be filed requiring the trial court to review one or more claimed errors. Second, the five justices of our Supreme Court conduct a review of sentence proportionality and direct appeal claims - this is the prime and typically the most meaningful examination of the direct review avenue. Third, our Supreme Court's decision is subject to a motion for rehearing and, fourth, is subject to review by the nine justices of the United States Supreme Court. Fifth, the United States Supreme Court's decision is subject to a petition for rehearing.

The Commission discussed adding at the direct appeal stage a specific comparative analysis between death sentences in addition to the proportionality review; however, no consensus was reached.

The second avenue, state PCR, provides six opportunities for potential reexamination, the first and third typically being the most meaningful. First, on petition

for PCR, a trial court reviews the petitioner's claims and usually holds an evidentiary hearing. Second, the trial court's decision is subject to a motion to correct error. Third, the trial court's decision is reviewed by the five members of our Supreme Court and, fourth, is subject to a motion for rehearing by that Court. Fifth, our Supreme Court's decision is subject to review by the nine justices of the United States Supreme Court and, sixth, is subject to a petition for rehearing by that Court. Further, successive PCR petitions may be available; however these are restricted and cannot be filed without our Supreme Court's permission. Any successive PCR petition is subject to the same six opportunities for potential reexamination as was the first petition.

The third avenue, federal habeas corpus, has six opportunities for potential reexamination, the first and third typically being the most meaningful. First, on a petition for federal habeas corpus, the federal district court reviews the petitioner's claims. Second, the district court's decision is subject to a motion to reconsider. Third, the district court's decision is reviewed by a three-judge panel of the federal Seventh Circuit Court of Appeals. Fourth, that decision is subject to motions both for rehearing by the same three-judge panel and for rehearing *en banc* by all 11 active judges presently sitting on the Seventh Circuit Court. Fifth, the Seventh Circuit's decision is subject to review by the nine justices of the United States Supreme Court and, sixth, is subject to a petition for rehearing. Successive habeas petitions may be available but are restricted and cannot be filed without the Seventh Circuit's permission. A successive habeas petition is subject to the same reexamination levels as was the first petition.

The fourth avenue, executive clemency, has two levels of potential reexamination. On a petition for clemency, the five-member Parole Board conducts a review and submits its recommendation to the Governor, who considers that recommendation and decides whether to grant or deny clemency.

Each avenue of review is restricted by rule to prescribed issues. Issues already

reviewed often are unreviewable later as *res judicata*, and those not timely raised often are unreviewable later as waived. In this sense, particular claims are sometimes characterized as having a one-avenue (with its multiple levels within) chance for review.

The benefits of such prescribed review include society's maximization of judicial and criminal justice resources through limiting claim repetition or claims apparently not important enough to timely raise. Indeed, without the principles of waiver and *res judicata*, a capital inmate could obtain multiple trials and interminable review for the same crime.

A possible risk of the strict application of waiver could be that innocent people may be convicted and executed. Safeguards are employed to minimize this risk. In order to provide review for an otherwise unavailable claim of error, the "fundamental error" exception to the procedural bars of *res judicata* and waiver may be invoked, or issues may be reframed or recharacterized in order to avoid those procedural bars.

An example of the latter is former capital inmate Perry S. Miller, who on direct appeal claimed error in the admission of evidence -- that his prior criminal conduct should not have been admitted at trial. Having failed in that claim, on PCR he recharacterized it as an ineffective assistance of counsel claim -- that his counsel was ineffective for opening the door to the admission of that same evidence. Having failed in that claim, on habeas he made the same recharacterized claim, which failed at the district level and then prevailed at the Seventh Circuit, resulting in the reversal of his convictions and sentence. Ineffective assistance of trial or appellate counsel can be raised on direct appeal, PCR, and, if raised in state court, on habeas review.

Technically there is no specific review provision for raising a free-standing "claim of innocence" unrelated to the evidence produced at trial or to procedural claims. This is so because the fact-finding nature of the trial is relied upon to determine the defendant's guilt or innocence in the first instance, with the State bearing the entire burden of proving

guilt beyond a reasonable doubt and the defendant bearing no legal burden whatsoever to prove innocence. In this regard, the trial is the "paramount event" in a case.³⁰¹ The nature of review, as opposed to that of trial, centers around the fairness of the trial's fact-finding process; claims thereafter raising the possibility of innocence are addressed on review in terms of sufficiency of evidence to convict and of procedural propriety at trial.

When sufficiency of the evidence is raised, the appellate court examines the facts in a light most favorable to the conviction and, except in rare circumstances, will not reweigh the facts or the credibility of the witnesses when assessing the validity of a conviction or sentence.

If found to be material, new evidence may be reviewed if it was not available at trial. If it was available at trial, material evidence not admitted at trial may be reviewed as part of the prejudice prong of an ineffective assistance of counsel claim.

A troubling aspect of the review process takes the form of frequent inordinate time delays from sentence to execution. For cases tried before rule changes in the early 1990s, some delays have lasted for as many as 21 years.³⁰² Indiana postconviction and trial rules implemented in the early 1990s providing for more expeditious review have decreased delays, with average time from sentencing to execution currently approximating ten years. Further improvements are needed.

The greatest time delays are attributed to federal habeas proceedings, Indiana Supreme Court review, and lack of greater numbers of capital qualified counsel.

³⁰¹ See *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 860 (1993).

³⁰² For example, capital inmate James Lowery, convicted of the shooting murders of 80 year old Gertrude Thompson and her 80 year old husband Mark Thompson, was sentenced on July 11, 1980, and executed after exhausting all avenues of review on June 27, 2001. Capital inmate Michael William Daniels, convicted of the shooting murder of 40 year old Allen Streett, was sentenced on September 14, 1979, and remains on death row today, having recently completed appeal of his second PCR denial.

Regarding federal habeas review, before the 1996 Anti-Terrorism and Effective Death Penalty Act no deadline existed for filing a habeas action. Effective April 1996, an inmate seeking habeas review has one year from date of finality of direct appeal to file a habeas petition. That year is tolled during PCR proceedings, from the time of filing the PCR petition through the PCR appellate decision. A portion of the year is inevitably expended preparing the PCR petition by new counsel unfamiliar with the case. And the balance is then available for new habeas counsel to prepare a new habeas petition. Of 35 total habeas actions filed since 1977, 11 have been decided, including one successive habeas petition. The average time to file a habeas action is 9.38 months. The average time pending on a final habeas decision is 37.91 months.³⁰³

Regarding Indiana Supreme Court review, of the 91 direct appeal decisions since 1977, the time span from sentencing to Supreme Court opinion averages 39.4 months.³⁰⁴ This average has likely improved in the last decade. At its most recent session, the Indiana General Assembly amended Indiana's constitution to remove non-capital criminal cases from our Supreme Court's mandatory docket. The Commission expects this eased docket to result in more expedient review of capital cases in our Supreme Court.

While no completely failsafe system is humanly possible, the Commission finds that the review procedures in place in Indiana and in our Seventh Circuit federal appellate courts generally result in a full and fair review of non-waived legal issues in capital cases. In so finding, the Commission recommends protecting this system by taking special care to ensure continual, adequate funding for all relevant components of

³⁰³ Information provided by Susan Carpenter, Indiana Public Defender and Indiana Criminal Law Study Commission member.

³⁰⁴ Steve Stewart and the Indiana Prosecuting Attorneys Council, *Indiana Death Row 2000*, June 1, 2001, p. 13.

the review process, especially for quality attorney advocates on all sides, whether defense or state.

IV.

Cost comparison between a death penalty case and a case where the charge and conviction is life without parole

The cost of any criminal case is subject to the extent of due process afforded to the defendant. Neither the Indiana nor the federal constitution requires more elaborate trial proceedings for defendants charged with capital rather than noncapital offenses. But the severity and irreversibility of a capital sentence has induced some states to prescribe more elaborate trial and appellate procedures for those facing possible execution.

In Indiana capital cases are more extensively litigated than other murder cases, reflecting the capital legal procedure precept that “death is different.” When the ultimate penalty is at stake, litigation moves into a “super due process” mode that goes above and beyond the due process invoked by a potential term of years. The costs of a capital trial are affected by its elaborate procedural safeguards and by the greater time and effort expended to meticulously challenge and verify evidence.

Not surprisingly then, capital cases are more expensive than other murder cases. A capital case takes longer time and more money to litigate than other murder cases. As discussed in this report’s previous sections, an indigent capital defendant receives extra legal representation, in terms of both numbers of lawyers and the qualifications of those lawyers. A capital jury must be qualified and sequestered. State and county governments pay an indigent defendant’s defense costs to ensure an adequate defense, including investigators, experts, testing, and incidentals. Most capital defendants are, or become during the course of capital proceedings, indigent.

Other factors that can influence a county’s costs in defending a capital case include the strength and nature of the evidence against the defendant, the mitigation evidence available, and the parties’ willingness to plea bargain.

Some cases require expensive forensic testing in order to develop a defense or to challenge the state's case. In other cases, such testing is not an issue. Similarly, the number of witnesses and their location can make investigation and the deposing of witnesses very costly.

Mitigation evidence is crucial in a capital case, and gathering this information can be very expensive, especially in the case of a defendant who has been transient and lived throughout the country or who has a substantial relevant medical history. Information about the character and background of the defendant must be obtained from various sources including mental health professionals, family, neighbors, and coworkers.

The willingness to plea bargain can influence the cost of resolving a capital case. An unwillingness to negotiate a plea in a capital case leaves no choice but to go to trial. While in some cases negotiation is not in the prosecutor's or defendant's best interest, in some cases both sides can be well served by a negotiated plea.

Unlike noncapital trials, where fact finding and sentence are determined in a single proceeding, capital defendants are tried and sentenced in a bifurcated process. This bifurcated process entails extensive juror involvement, necessitating careful empaneling and requiring both the prosecution and defense to rigorously question, over a period of weeks or months, a large number of potential jurors. Jury costs comprise one of the most expensive components of a capital trial.¹

Post-trial review costs -- direct appeal, postconviction proceedings, federal habeas corpus, and clemency -- can comprise the most expensive cost component of a capital case.²

³⁰⁵ Margot Garey, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221, 1253-54 (1985).

² Margot Garey, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221, 1253-54 (1985).

The difficulty in examining cost differences between a death penalty case and a case where the charge and conviction is life without parole lies in defining factors and parameters for equivalent comparison.³ For example, Indiana's two most expensive life without parole cases, *Walls* and *Weatherford*,⁴ are cases in which the defendants pled to life without parole after a jury convicted them of capital murder but before the capital penalty phase took place. Thus *Walls* and *Weatherford* have all of the costs associated with a capital trial, although no capital sentence was imposed. An additional four life without parole cases also resulted from sentences imposed after a complete capital trial.

Defining "costs" can translate into a moving target. Should opportunity costs be considered "costs"? If a potential capital sentence sometimes acts to encourage some capital murder defendants to plead guilty, thus saving the costs of a capital trial, how should this be factored into the equation? How does one value the costs of the time of the various lawyers involved in the process when each comes from a different part of the legal system having its own organizational structure - public defenders, prosecutors, deputy attorneys general, and supreme court justices and law clerks.

Thus, pointing to a single number as representative of the cost of a death penalty case is misleading, because there will always be cost examples that are much higher or lower due to the circumstances of the particular case and due to study parameters.⁵

³ See Public Defender Commission staff attorney Thomas M. Carusillo's May 29, 2001, memorandum to Criminal Law Study Commission staff attorney Kathryn Janeway.

⁴ See reimbursement Charts after this report's page 61.

⁵ See, e.g., Philip J. Cook and Donna B. Slawson, *The Costs of processing Murder Cases in North Carolina*, Terry Sanford Institute of Public Policy, Duke University, May 1993; Richard C. Dieter, *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty*, Death Penalty Information Center, October 1992, revised Fall 1994; Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, Hon. James R. Spencer, Chair, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation*, May 1998.

To examine how the cost of a death penalty case compares to that of a case where the charge and conviction is life without parole, the Criminal Law Study Commission asked Legislative Services Agency Senior Fiscal Analyst Mark Goodpaster to conduct comparison research. On a regular basis Mr. Goodpaster presented to the Commission status reports on this research. After reviewing the research on this ongoing basis and receiving Mr. Goodpaster's final report, the Commission adopted the report's conclusion. The research, analysis, and writing work of Mr. Goodpaster appears below and comprises the remainder of this report's section IV, "Cost Comparison Between a Death Penalty Case and a Case Where the Charge and Conviction is Life Without Parole."

SUMMARY:

Request by Criminal Law Study Commission:

The purpose of this analysis was to compare the cost of a case where the charge and conviction results in a capital sentence with the cost of a case where the charge and conviction results in a life without parole sentence.

Comparing the costs of these cases involved compiling information at several stages of judicial procedure at both the county and state levels of government. In addition, several changes have occurred in state law and in Supreme Court rules that affect both the types of cases and the time period in which the cases can be used for comparison purposes.

Method Used:

To identify the relevant information in the appropriate time periods, LSA developed a data base from information compiled by the Indiana Supreme Court, the Public Defender Council, and the Clark County Prosecuting Attorney. LSA supplemented this information by contacting court staff, county auditors, sheriffs, and prosecuting attorneys in counties where trials involving either the death penalty or life without parole occurred.

Once the database was established, LSA estimated the costs of a single individual facing either the death penalty or life without parole. It then applied these same costs to the 84 offenders who were sentenced to death to estimate what the costs would be if each of these offenders were tried under the requirements of Criminal Rule 24 (CR 24) and if they were tried and sentenced as if the most serious sentence was life imprisonment without parole.

The two sentencing options result in costs occurring at different points in time. The death penalty results in higher costs occurring at an earlier point but with no costs after the execution date. For death row offenders, the length of time on death row prior to execution ranged from less than two years to as many as 18 years. LSA also estimated that the length of time on Death Row was 10.5 years based on offenders who have been executed. By contrast, offenders sentenced to life without parole will remain in Level 4 facilities for 30 to 50 years, depending on the age, sex, and race of the offender at the time of sentencing.

Because these cost streams occur at different points in time, they are discounted to a net present value to allow for a common point of comparison. Since these two sentences must be projected out 50 years, both the inflation rate and the possible discount rate for determining present value must be assumed. Accordingly, it was assumed that both inflation and the selected discount rate will remain within the bounds of inflation and discount rates between 1970 and 2001. Based on this assumption, the selected average annual inflation rate was assumed to be 5.2% while the average annual discount rate was assumed to be 7.97%.

Analysis and Conclusions:

When applying the present value to the two cost streams for a "typical" offender who is executed within 10.5 years of receiving the death sentence, the present value cost for an offender to be executed after receiving legal representation as required under CR 24, exceeds by 21.15% the costs of sentencing the offender to life without parole under the less stringent requirements for legal representation.

To estimate the systemic costs of the death penalty and life without parole, LSA compared the costs of the death penalty and life without parole for the 84 offenders who received the death penalty between 1970 and 2000. Of the 84 offenders who have been on death row, nine were executed, 38 are currently on death row, and 37 have had their sentences reversed. This analysis assumes that the nine offenders who were executed will be executed in the same

time period as they were actually executed. The outcomes of the 38 offenders who are currently on Death Row will depend on whether any of their death sentences will be reversed. Currently, about 20% of the offenders who have received death sentences since 1993 have their sentences reversed at either the state or federal review level. In one scenario, all offenders currently on Death Row will be executed within a definite period of time based on the average of a "typical" offender. In a second scenario, it is assumed that 20% of the death sentences of these offenders will be reversed and resentenced to life without parole.

All offenders for whom the death penalty was requested would receive two attorneys and an almost unlimited expense account as required under CR 24. In the life without parole scenario, all offenders who have been executed or are currently on death row are assumed to remain in Level 4 facilities for their natural lives. Those whose death sentences were reversed and resentenced will receive the same sentences under the life without parole scenario.

When comparing the net present value at an annual inflation rate of 5.2% and using a discount rate of 7.97%, the costs of the death penalty for those who have been executed in this first group is 17.73% greater than if they were sentenced with life without parole. (If 20% of these offenders currently on Death Row have their sentences reversed, the cost of the death penalty would be 22.34% greater.) For those offenders whose sentences were reversed, the costs of the death penalty due to the initial costs of Criminal Rule 24 are 63.99% more than if they were sentenced to Life without parole. When combining the costs of these two cohorts, the additional costs for the Death Penalty is 30.2% more than the combined costs of life without parole (37.76% more if it is assumed that 20% of the offenders on death row will have their sentences reversed and instead receive sentences of life without parole).

METHODOLOGY

LSA used this method to develop the data for the analysis.

Method of Disposition: Murder cases can be resolved either by a jury trial or in a plea agreement between the defendant and the prosecuting attorney that is accepted by the judge of the sentencing court. To ensure that similar types of cases are used, LSA selected trials in which a jury was impaneled and where the jury made a final determination to compare cases involving the death penalty with life without parole.

Time Period for Selection: Life without parole became a sentencing option in 1992, while Criminal Rule 24 was issued in 1993. CR 24 requires that two qualified attorneys represent a defendant in a murder trial in which the death penalty was requested. The Indiana Supreme Court amended Rule 24 of the Indiana Rules of Criminal Procedure, requiring the appointment of experienced counsel with minimum caseloads and unlimited compensation in all capital cases.¹ Since CR 24 was enacted in 1993, only those cases that have been tried since 1993 are included in the data set.

Composite of Offenders: The costs of execution compared with a lifetime imprisonment will vary due to the age and life expectancy of each individual offender. In this analysis, a composite was developed based on 84 offenders who were at one point sentenced to death at the trial court level.

This composite of offenders was used to develop an average age of an offender at the time of sentencing and the offender's life expectancy. The average age at the time of sentencing was 29.4 years, the youngest being 17 and the oldest being 50.

¹ <http://www.clarkprosecutor.org/html/death/timeline.htm>

Defendants Selected For Comparison: LSA selected two groups to compare. The first group of defendants had a request for the death penalty filed against them and no plea agreement entered prior to trial. For the second group, the prosecuting attorney in the case had not filed a death penalty request and life without parole was the most serious sentencing option. The outcome of the trial was not considered. For both groups, a jury was impaneled, a trial occurred, and the jury ultimately recommended a decision.

Based on this data base, 28 defendants who were being tried where a request for the death penalty was filed were compared with 18 defendants who were being tried where the death penalty was not a sentencing option and life without parole was the most serious sentencing option.

Appendix A shows the names of the defendants in these two groups. In the group where the death penalty was requested, there were 28 defendants: 20 white males and eight black males.

Appendix B shows the group where the death penalty was not filed. Of these 18 defendants, there were 14 white males, one white female, and three black males.

Which Costs Are Selected: "Out of pocket costs" are considered to be those costs that can be directly associated with the costs of the defendant's trial. For instance, the salaries of court and police personnel will be absorbed by the county government budgets and will be paid whether or not a defendant is tried in a case. However, costs associated with other activities that can be directly associated with a murder trial would be considered as "out of pocket" costs.

At the county level, the affected agencies include the trial courts, the office of the prosecuting attorney, and the county sheriff. The following are considered to be "out of pocket" expenses for this study:

- ☐ attorneys' fees, investigations, and expert witnesses for each trial;
- ☐ jury-related costs, including per diem, travel, meals, lodging, and overtime expenses for court personnel;
- ☐ supplemental appropriations for prosecuting attorney costs; and
- ☐ overtime expenditures when sheriffs departments provide security during the course of murder trials.

State agencies affected by both the death penalty trials and life without parole trials include the Office of the Attorney General, the State Public Defender's Office, the Indiana State Police, and the Department of Correction.

While neither the Public Defender's Office nor the Office of the Attorney General incur overtime costs associated with death penalty cases, both offices report that significant staff time is avoided when the staff are involved in appeals in life without parole cases compared to death penalty cases. Consequently, an attempt is made to represent the costs expended by each agency in cases involving death penalty cases and cases involving long sentences when life without parole is considered.

Both the State Police and the Department of Correction will incur additional costs associated with overtime when executions occur. In addition, the Department of Correction incurs additional costs related to each execution for the costs of chemicals, the contract arrangements with a physician who supervises the execution, and travel expenses for central staff.

Health Care Costs For Aging Offenders: A significant cost associated with life without parole is the increasing cost of health care for aging offenders. DOC provides some insight into this cost with the snapshot information from August 17, 2001, showing the number of offenders

older than 60 who are assigned to the general population or a special needs unit developed for individuals with medical and other health-related problems.

As Figure 1 shows, the proportion of offenders who were in special needs units rather than in the general population increase as the offenders age. The percentage of offenders who were in special needs units increased from 19% for offenders between 60 and 64 years of age to 38% for offenders 75 years of age and older.

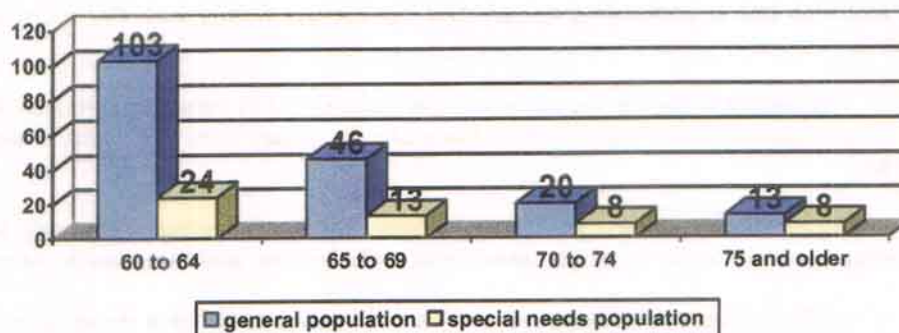


Figure 1: Offenders 60 years of age and older and their assignment to general population and special needs facilities based on a one-day snapshot on August 17, 2001.

DOC indicated that no information was available concerning the per diem costs of these facilities as opposed to general population facilities. To allow the analysis to reflect the additional health care costs of the aging offenders, the following chart was used to adjust for these costs by age group. These costs are based on an average per diem expenditure for health care of \$2,800 and adjusted based on census reports for health care expenditures by age group.² Essentially the health care costs for 75-year-old offenders will be 126% greater than for 30-year-old offenders.

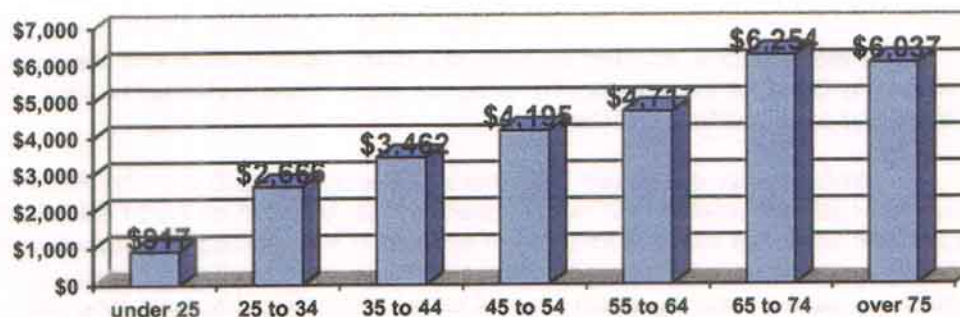


Figure 2: Estimated Health Care Costs By Age Group of Offender Based on Per Diem Expenditures Reported by the Department of Correction and the US Census Bureau.

Accounting for inflation: All costs are initially stated in 2001 dollars.

² 1999 Statistical Abstract Of The United States, Table 184, Average Annual Expenditures Per Consumer Unit For Health Care 1985 - 1997

THE COSTS OF A "TYPICAL" CASE:

The "Typical" Death Row Offender: Based on the 84 individuals against whom the death penalty was requested, measurements of central tendency were developed for the age of offenders when they were sentenced, their life expectancy, and their length of stay on Death Row.

- The average age of offenders at time of sentencing was 29.3 years.
- Offenders spent on average 10.5 years on Death Row before being executed.
- The average life expectancy for the 84 offenders was 77 years. Consequently, the expected time when an offender would remain in prison until death is 47 years.

A Timeline for Comparison Purposes:

A time line was developed to compare the costs associated with a "typical" defendant who was either tried for the death penalty or for life without parole.

Trial Phase – Approximately One Year: The trial phase occurs between the time when criminal charges and the death penalty are initially filed against the defendant and when the jury recommends a sentence. Between the time that charges are filed and the defendant is brought to trial, both the State and the defendant will conduct intensive investigations to determine whether the defendant committed the crime. Both sides will tend to make extensive use of expert witnesses to connect the defendant to the crime, or to distance the defendant from the crime. Because a capital case is a bifurcated proceeding, both sides will also investigate whether the defendant should receive the death penalty. Capital trials almost always involve expert psychiatric testimony.

During year one, the costs that are incurred are generally at the county level. The courts incur costs for the legal defense of the accused, the jury that is impaneled, any overtime worked by court staff, and overtime security worked by the county sheriff's department. Outside of its annual appropriations the county council may augment the prosecuting attorneys budget with additional funding to prosecute the particular case. When comparing the time spent at the county level, the average amount of time from the criminal filing to the final sentencing in a death penalty case was 399 days. For purposes of this analysis, it was assumed that the trial phase from time of original filing to a sentence is one year.

Based on the analysis that was reported on the costs at the county level, the costs in year one for a death penalty case as compared to a jury trial involving life without parole as the most serious sentencing option is shown in Figure 3. (These averages are based on the defendants shown in Appendices A and B.)

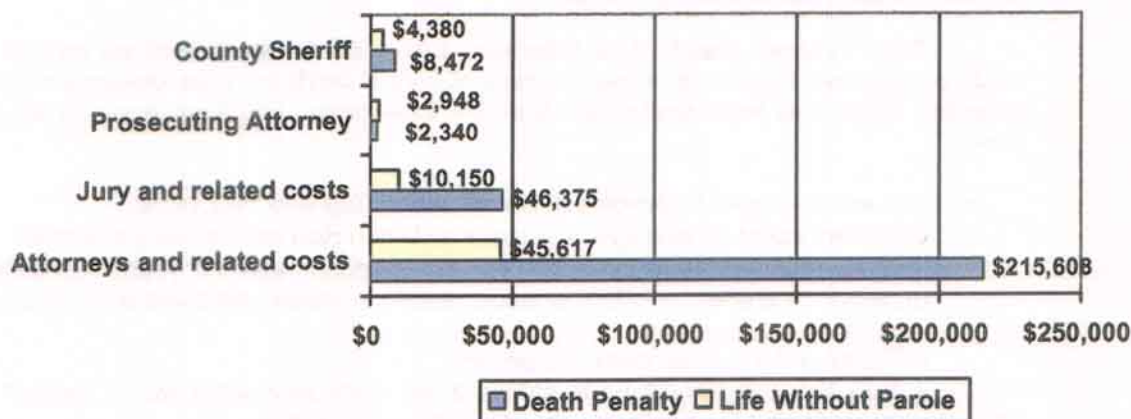


Figure 3: The Average Trial Related Expenditures in Death Penalty and Life Without Parole Cases.

Direct Appeals Stage – Approximately Three Years: During the direct appeals stage, the defendant will raise legal challenges to his conviction and sentence. The defendant may not reopen his case or present new evidence; the defendant is required to show that what happened at trial was legally erroneous. During direct appeals, defendants typically raise a large number of claims. This is because appellate courts may find claims that could have been raised on direct appeal, but were not, to be waived. In addition, a federal court reviewing a habeas corpus petition may not consider claims that were not presented to a state court or that a state court had found to be waived. Common claims include constitutional claims, claims that evidence (including confessions) was improperly gathered and should have been suppressed, claims that jury instructions were erroneous, and various claims that the defendant should not have received a death sentence as a matter of law. In general, the average time that offenders who were executed took to exhaust their direct appeal was two years. During the second year, the offender is assigned to either death row or to a Level 4 facility. Offenders sentenced to life without parole are permanently assigned to Level 4 facilities where the offenders are assigned to a single cell and may share a cell with another offender.

During the second and third year, the county in which the case was prosecuted, the Office of the Attorney General and the Department of Correction, incur the costs associated with both offenders.

The county in which the case was prosecuted pays for the costs of the appeals and may be reimbursed by the Public Defense Fund for half of all qualified expenditures. Based on information gathered through surveys of counties and the Public Defenders Council, Figure 4 shows the average costs incurred by the counties and reimbursed by the state for the entire cost of appeals. These average estimates are based on the reported information for offenders shown in Appendix C.

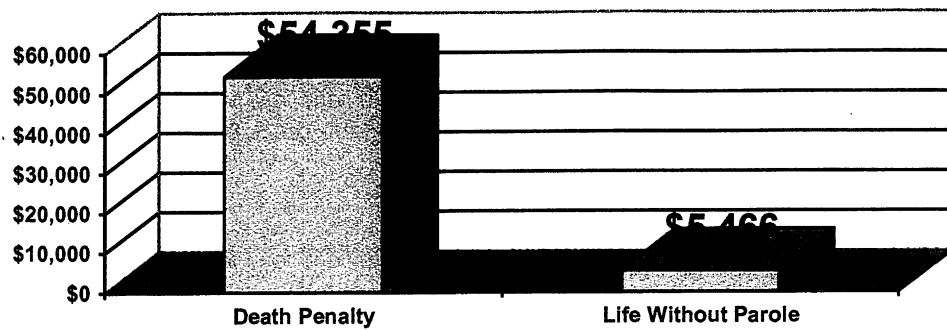


Figure 4: Average County Expenditures for Direct Appeals in Death Penalty and Life Without Parole Cases

The length of time for direct appeals to be fully heard and acted upon took on average about two years for those who were executed. Consequently, half of the cost of appeals multiplied by the inflation rate is shown for the second year, and the other half is shown for the third year, again multiplied by the inflation rate.

The Office of the Attorney General will represent the state in the direct appeals. Like the costs that counties incur for the appeals for the convicted offender, half of the costs incurred by the Attorney General are assigned to the second year and the other half to the third year. Appendix D describes how these costs were estimated.

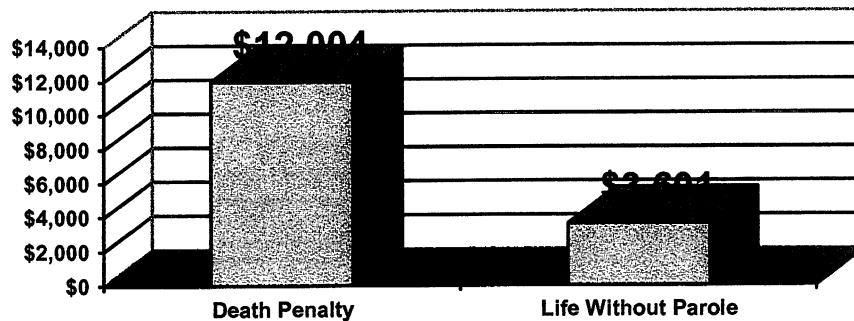


Figure 5: Estimated Expenditures in Staff Time for the Office of Attorney General in the Direct Appeals Stage of Cases Involving the Death Penalty and Life Without Parole

The Department of Correction incurs the costs for housing the offenders and for providing health care and other services. During the second year, the offender is assigned to either death row or to a Level 4 facility. Offenders sentenced to life without parole are permanently assigned to Level 4 facilities. In Level 4 facilities, the offenders are assigned to a cell and may share the cell with another offender.

Post Conviction Review Stage – Approximately Five Years: After direct appeals are denied, the next step is for the offender to file for post conviction relief (PCR). During PCR, defendants are entitled to challenge their convictions or sentences by presenting claims that were unavailable on direct appeal. Ineffective assistance of counsel claims (both trial and appellate counsel) are commonly presented during post conviction proceedings. An ineffective assistance of counsel claim often permits defendants to reopen parts of their cases. As examples, defendants can claim that their attorneys were ineffective for failing to present certain evidence (eyewitnesses, character witnesses, expert witnesses) or defendants will be permitted to present

these witnesses, along with their testimony, to show how they were harmed by the errors of their attorneys.

Both the Office of the Attorney General and the prosecuting attorney represent the state during this stage. The estimated costs incurred by the AG's office for post conviction relief are shown in Figure 6. Appendix D further describes these costs of staff time.

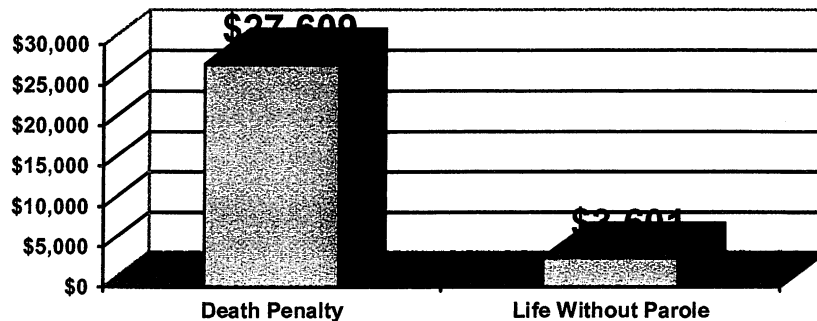


Figure 6: Average Expenditures in Staff Time for Office of the Attorney General for Post Conviction Relief for Cases Involving Death Penalty and Life Without Parole

The prosecuting attorney represents the state in post conviction relief in cases where the sentence was life without parole. There were no additional costs associated with the prosecuting attorneys to represent the state in this phase of the process.

The State Public Defender represents the convicted offenders who have been sentenced to either death or life without parole. The estimated cost for the State Public Defender to represent these convicted offenders is shown in Figure 7. Appendix E further describes how the costs for the State Public Defender's Office were estimated.

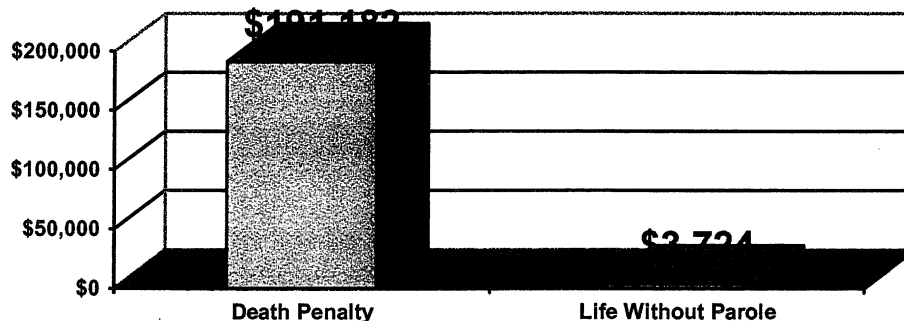


Figure 7: Average Expenditures in Staff Time for State Public Defender for Post Conviction Relief in Death Penalty and Life Without Parole Cases

Federal Habeas Corpus Stage – Approximately Two and One-Half Years: When the appeal for post conviction relief is denied, the convicted offender is permitted to file for habeas relief in federal court. During this process, after a defendant has completed his appellate remedies following PCR, he has exhausted his state court remedies and is entitled to seek habeas corpus review of his conviction. Habeas corpus is a limited remedy: a defendant may only raise on habeas a claim that (1) is federal in nature (i.e., a constitutional claim); and (2) has already been properly presented to a state court and rejected on the merits. While habeas cases are technically district court cases where the parties could appear and present evidence, in

practice, it is extremely rare for a hearing to be held in a habeas case. Almost all habeas cases are resolved on the pleadings, although oral arguments are commonly held in capital habeas cases.

The Office of the Attorney General represents the state in these proceedings. The cost associated with this stage is shown in Figure 8. Appendix D further describes how these estimates were made.

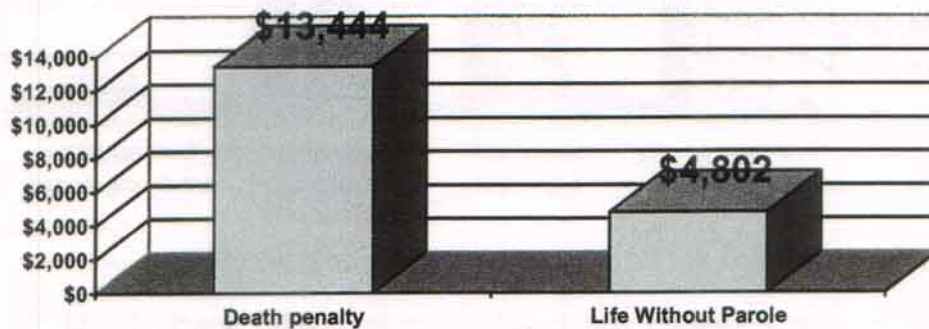


Figure 8: Estimated Cost in Staff Hours for Office of Attorney General for Habeas Stage in Death Penalty and Life Without Parole Cases

An attorney who represents the convicted offender at this stage is appointed and paid by the federal courts. This cost is not included in this analysis since it does not affect state or local spending in Indiana.

Final Phase – Approximately Two Months: In the final two months after the offender is denied relief through the habeas appeals at the federal level, the death row offender can also make several other appeals and clemency to the governor. During this time, the AG's office will spend time litigating in a number of appeals. The estimated cost for this phase of the process for the AG's office is \$16,000 stated in 2001 dollars.

The Office of the Attorney General will also continue to represent the state if an offender fully contests the scheduled execution until the execution occurs. Based on staff costs, the estimated cost of appeals in staff time is \$10,811.

When the offender is executed, the State Police will incur overtime costs for providing security during the execution. For the Gerald Bivins execution, the State Police reported spending \$4,012 for 160.5 officer hours. (Appendix F)

The Department of Correction also reports a significant increase in expenditures for the time leading to the execution. From the executions of James Brewer and Gerald Bivins, DOC made the following estimates of costs incurred during the execution process. In addition to the costs of incarceration, the Department of Correction incurs a series of additional costs at the time of execution. These costs include staff overtime on the day of the execution, incidental expenses such as chemicals, funeral arrangements, radios, food, overtime associated with practices relating to scheduled execution, and yearly staff overtime from periodic practices that are not related to a particular scheduled execution. These estimates are based on the executions of Gerald Bivins in March 2001 and James Lowery in June 2001. (Appendix G)

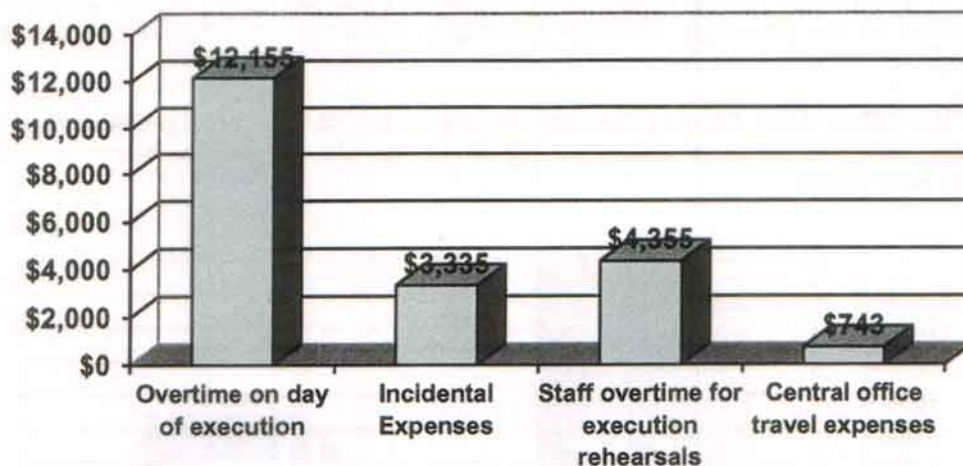


Figure 9: Costs To Department Of Correction For Executing An Offender

Besides costs associated with specific executions, DOC reports \$17,421 in monthly overtime practices that are not related to particular scheduled executions.

Post Execution Years – Approximately 37 Years: The costs for maintaining older offenders, particularly the costs associated with health care will continue increasing. The facilities may at some point also need to spend additional costs on facilities for elderly offenders.

The following represents the annual costs of health care for a 30-year-old white male offender sentenced to life without parole in 2000 and remaining in prison until death in 2045 based on an average annual inflation rate of 5.2% and using the average costs shown in Figure 2.

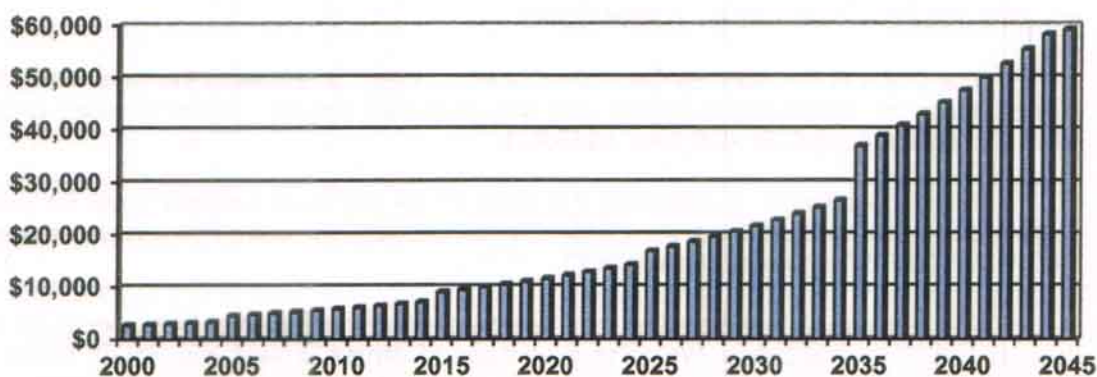


Figure 10: Example Of Annual Cost Of Health Care For A 30-Year-Old Offender Sentenced To Life Imprisonment Without Parole Assuming An Annual Inflation Rate Of 5.2%.

Present Value Analysis: Because the costs incurred by the state and county governments are not incurred in identical time periods, it is important that these costs be discounted to a common time period. As a result, the future costs must be discounted to acknowledge that future costs will not be as expensive as present cost.

The discount rate used in this analysis is based on a projected rate of inflation compared to the possible earning power of 30-year bonds over the next 47 years. While many unforeseen

events could affect these two series, it was assumed that inflation and rates of return for 30-year Treasury Bonds will remain within the high and low limits of the last 30 years. (See Figure 11) Consequently, it is assumed that the average inflation rate will be 5.2% and the average discount rate will be 7.97%.

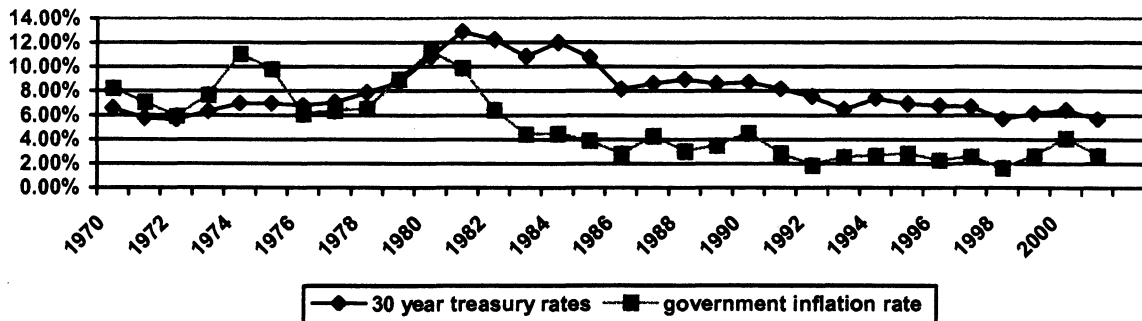


Figure 11: Inflation Rate and Rate of Return on 30 Year Treasury Bonds Between 1970 and 2001

Figure 12 illustrates how these costs are projected over time based on an inflation rate of 5.2%. A table showing these costs appears in Appendix H.

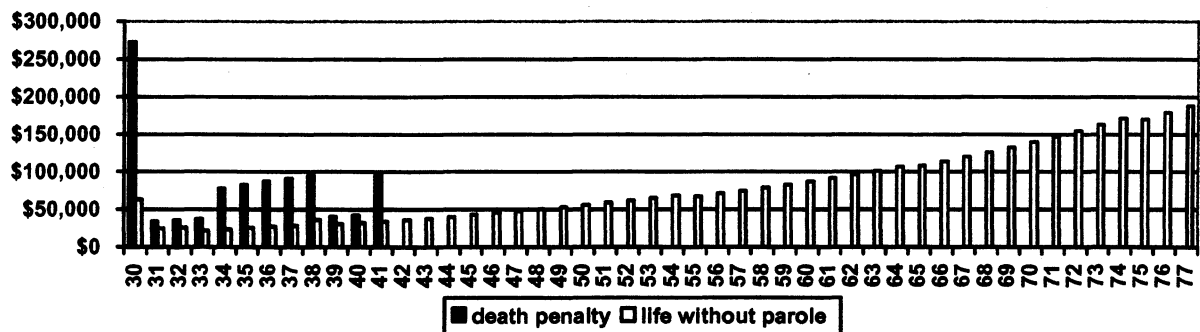


Figure 12: Comparing The Costs Of Death Penalty And Life Without Parole For A "Typical" Offender.

These cost streams are converted into a present value using a discount rate of 7.97% and shown in the following table.

	Present Value	Difference	Percent Difference
Death Penalty	\$667,560	\$116,544	21.15%
Life Without Parole	\$551,016		

When comparing the present value of the cost streams in Figure 12 at a discount rate of 7.97%, the additional present value cost of the death penalty was 21.15% greater for the death penalty than for life without parole. What this essentially means is that it would take 21.15% more money to finance the cost stream associated with the death penalty over the 11 years as opposed to financing the costs of life without parole over the 47-year period.

ESTIMATING THE SYSTEMIC EFFECTS OF THE DEATH PENALTY AND LIFE WITHOUT PAROLE:

Based on the 84 offenders who were given a sentence of death, it is possible to use the estimates shown in the previous section to compare the potential fiscal effects of these two sentencing options over time. This section does not attempt to compare the historic costs of the death penalty with the costs of life without parole over time. This is because insufficient information is available on the costs of trials that occurred during the 1980's. This analysis is used to compare the costs of the death penalty – with the requirements under Criminal Rule 24 – with the estimated costs if no death penalty was available and the most serious sentence was life without parole.

These 84 offenders are divided into two groups: those who have been executed (9) or are likely to be executed under the assumptions made in this study (38), and those who have been sentenced to death but have had their sentences reversed (37).

The following assumptions were used to compare the costs of the death penalty based on the estimates that were shown in the previous section.

- The length of time on Death Row would not have changed for these offenders.
- The offenders whose death sentences were reversed would have also had their life without parole sentences reversed as well and would serve the same amount of time under the life without parole scenario.
- The costs of the various stages of the death penalty are the same as those shown in Figures 2 through 9.
- The costs of health care are assumed to range with the age of the offenders. The following table is based on the costs reported in the US Census.

Figures 13 through 18 show the number of offenders in DOC facilities under two different scenarios. In the death penalty scenario, it was assumed that the nine offenders who have already been executed would have been executed in the same time and that the costs of the different stages of sentencing review would have remained the same. In addition, those offenders who are currently on Death Row and are assumed to be executed within the next 10 years. Under the life without parole scenario, these Death Row offenders would remain in DOC facilities for their natural lives based on the chart showing life expectancies in Appendix I.

Figure 13 compares the number of beds needed for offenders in this group (either executed or are currently on Death Row) if they were executed under the death penalty scenario and the number of beds needed if they are sentenced to life without parole.

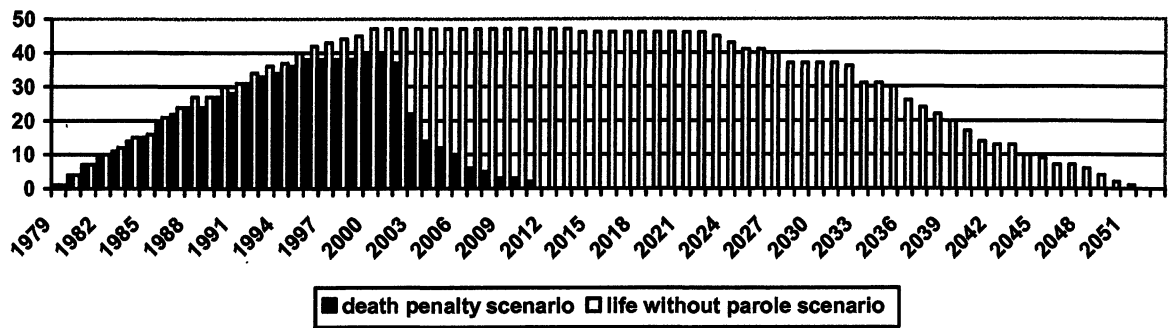


Figure 13: Comparing The Number Of Offenders Remaining In DOC Facilities Based On The Cohort Of Offenders On Death Row Between 1979 And 2001

Obviously, no offenders in this cohort remain in DOC facilities past 2012. By contrast, the number of offenders, if sentenced to life without parole, will peak at 47 offenders in 2000 and remain at that level until 2013 when the number will begin to decline as the cohort ages and dies.

Figure 14 compares the costs associated with the trials, appeals, reviews, health care, and per diem for these cases.

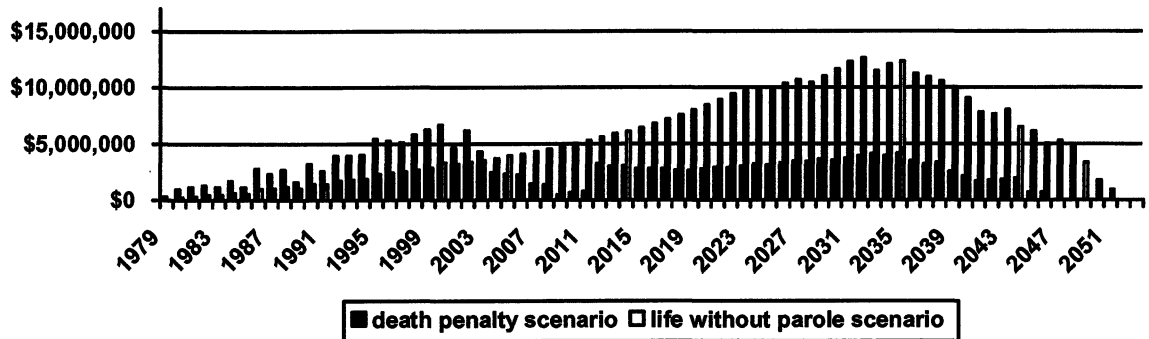


Figure 14: Costs Associated with Offenders Executed or Assumed to be Executed and Costs If Offenders were to be sentenced to life without parole

As Figure 14 shows, if these 47 offenders all receive the death penalty, the costs associated with their trials, appeals, imprisonment, and execution would be higher than the cost of life without parole expenses in the first 25 years but then would stop after the final executions occur in 2011. However, because the higher costs for life without parole do not begin to exceed the highest costs for the death penalty until after 2018 and do not reach the highest peak until after 2030, the discounted costs of the death penalty will exceed the discounted costs of life without parole by 17.73%.

	If All Offenders Currently on Death Row Are Executed
Death Penalty	\$27,484,394
Life Without Parole	\$23,345,740
Percentage Difference	17.73%

This assumes that all offenders currently on death row will be executed. Currently, about 20% of the offenders who have received death sentences since 1993 will have their sentences

reversed. To estimate how a 20% reversal rate would affect the cost differential, seven offenders currently on death row were randomly selected and assumed to receive life without parole sentences instead. The following table shows the differences in costs based on this assumption.

	If 20% of Offenders Currently on Death Row Have Sentences Reversed and Receive Life Without Parole
Death Penalty	\$28,561,458
Life Without Parole	\$23,345,740
Percentage Difference	22.34%

The second group is the 37 offenders who originally received a death sentence, but then were resentenced or were exonerated. If an offender was exonerated, then in either scenario, the offender was no longer included in DOC facilities in either the death penalty or life without parole scenario. In Figure 15, the number of offenders who originally received death sentences that were later reversed is portrayed. The lengths of stay in DOC facilities in terms of the accumulated numbers are the same under either scenario.

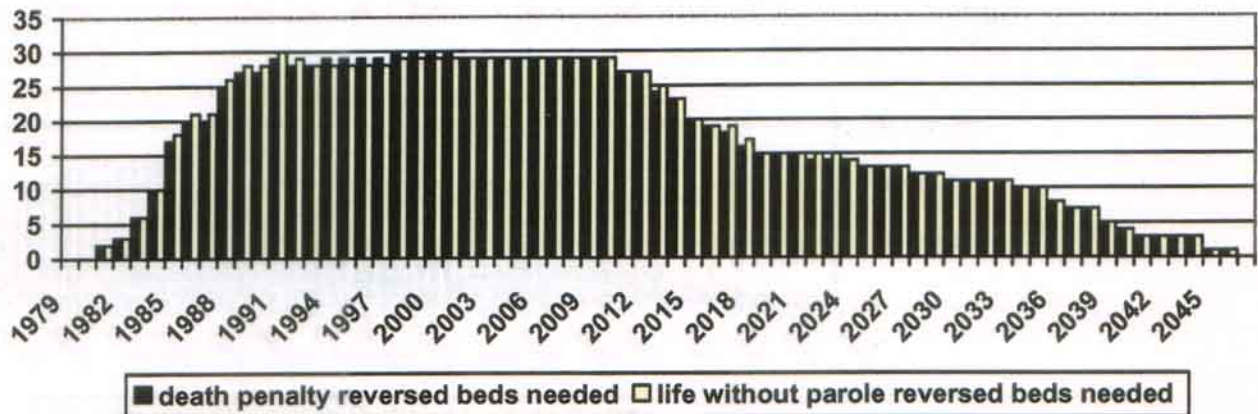


Figure 15. The Number Of Offenders In This Scenario Is Identical Because They Are Assumed To Have The Identical Length Of Stay Upon Resentencing

Figure 16 indicates that the costs associated with these offenders will be significantly different depending on whether a death sentence was requested. Because of the original costs of the jury trial and the requirement for two attorneys to represent these offenders, the costs under the death penalty scenario will be significantly higher. In addition, because these offenders will remain in prison for the same length of time under either scenario, the costs in the latter years will be the same.

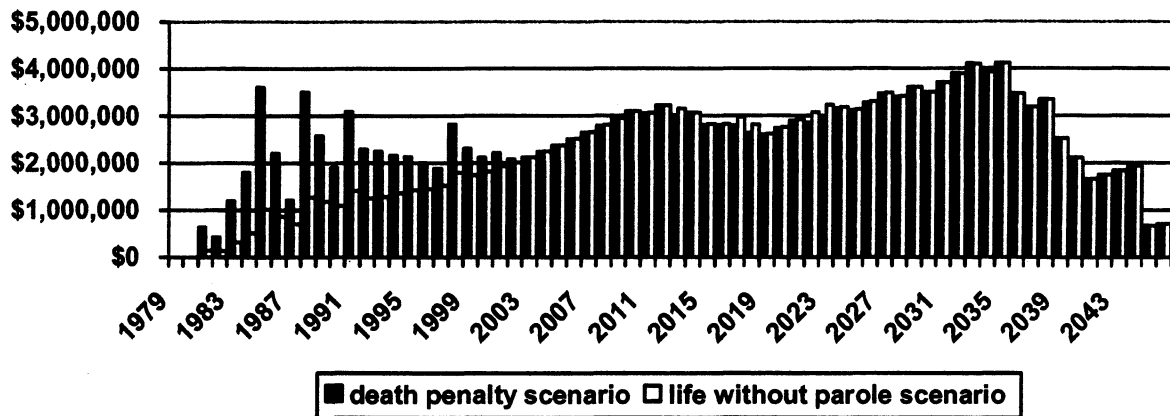


Figure 16 Comparing The Costs Associated With Offenders Whose Death Sentences Have Been Reversed And The Offenders Have Been Resentenced.

Consequently, the present value cost associated with the death penalty for these offenders will be significantly greater as the table below indicates:

	Offenders With Sentences Reversed
Death Penalty Scenario	\$22,507,041
Without Parole Scenario	\$13,724,643
Percent Difference	63.99%

When combining these cohorts, Figure 17 shows the accumulated number of offenders who were sentenced to death between 1979 and 2000 and the number of offenders who would have remained in DOC facilities over time after having their death sentences reversed.

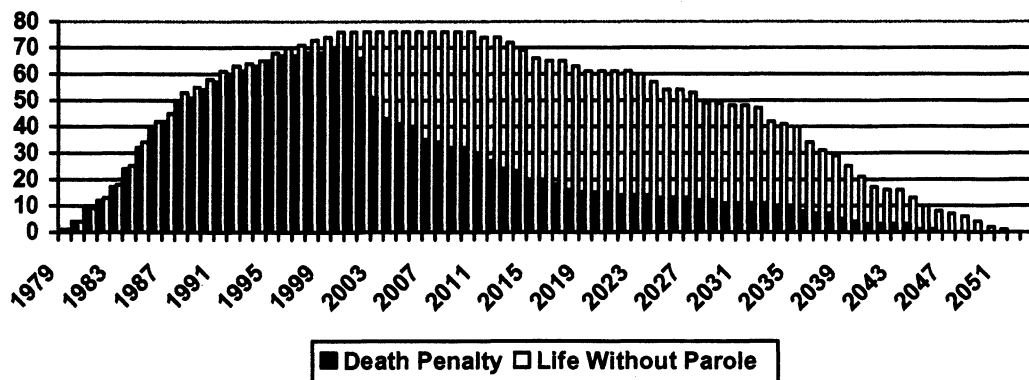


Figure 17: Total Number of Beds Needed For Offenders By Death Penalty and Life Without Parole Scenarios

Figure 18 compares the total costs over time for offenders in these two scenarios.

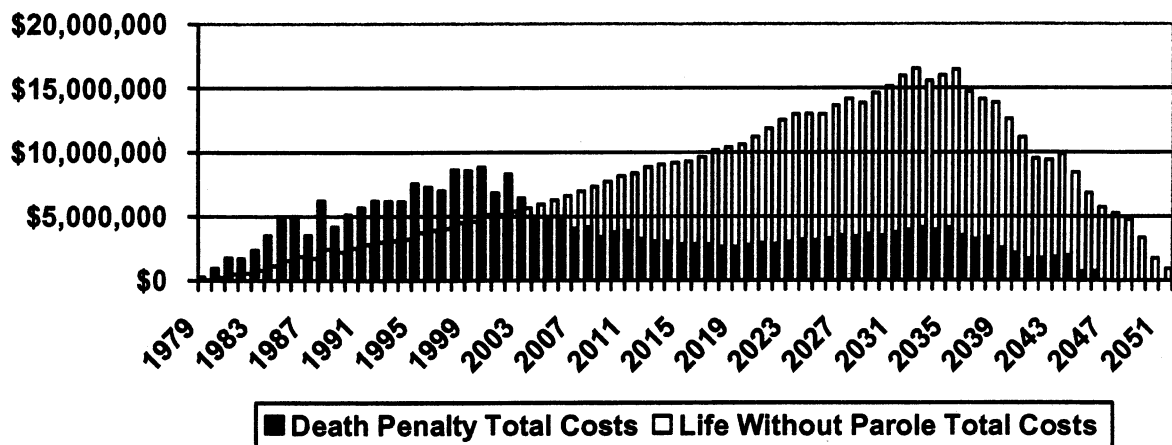


Figure 18: Total Costs for Offenders Under Death Penalty and Life Without Parole Scenarios

When combining the costs associated these two groups, the present value for the costs associated with the death penalty will exceed the total costs of life without parole by more than one third.

	Total Costs	Difference
Death Penalty	\$49,991,435	\$11,142,729
Life Without Parole	\$37,070,384	
Percent Difference	34.86%	

Assuming the 20% of the offenders on Death Row have their sentences reversed, the combined cost differential is shown below:

	Total Costs	Difference
Death Penalty	\$51,068,499	\$13,998,116
Life Without Parole	\$37,070,384	
Percent Difference	37.76%	

CONCLUSIONS:

The concept of present value analysis is especially appropriate when comparing a series of cost streams that occur at different points in time. For this comparison, the cost of the death penalty was greater than the costs of life imprisonment without parole for two reasons.

First, Criminal Rule 24 requires significantly more expenditures at an earlier point in the process.

Second, the costs associated with life without parole do not significantly increase until later in the offender's life.

Third, the state and county governments take a financial risk when offenders receive the death penalty, but then later have the death sentence reversed.

When comparing the costs of these two sentencing options on the offenders in Indiana who have been on Death Row between 1979 and 2000, it was found that the costs associated with cases in which offenders are resentenced because the death sentences have been reversed contributes significantly to the additional costs of the death penalty.

Appendix A: Defendants in Death Penalty Cases

Last	First	Year Charges Filed	Sex	Race	Adjusted Criminal Defense Costs	Adjusted Jury Costs	Adjusted Cost Of Appeals	Adjusted Prosecut'g Attorney Costs	Adjusted Sheriff And Security Costs
Ajabu	Kofi	1994	Male	Black	\$17,084	\$288,961			
Allen	Howard	1993	Male	Black	\$101,543		\$91,646		
Dickens	Gregory	1997	Male	Black	\$399,228	\$157,801		\$0	\$48,874
Dye	Walter	1996	Male	Black	\$82,343	\$25,809	\$33,146	\$0	
Jones	Roman	1995	Male	Black	\$52,775	\$2,923			\$0
Powell	Myron	1997	Male	Black	\$296,647	\$6,805		\$0	
Price	Kerrie D.	1997	Male	Black	\$192,623	\$14,791		\$0	
Roseborough	Jesse	1993	Male	Black		\$21,268			\$0
Barker	Charles	1994	Male	White	\$164,781	\$9,549	\$35,675	\$0	
Corcoran	Joseph	1997	Male	White	\$104,258	\$53,740		\$0	
Garrett	Edgar	1995	Male	White	\$74,815	\$3,281			
Gross	Jeremy	1998	Male	White	\$194,266	\$10,870		\$0	
Ingle	John	1996	Male	White	\$228,693	\$109,662	\$29,053		\$34,340
Kubsch	Wayne	1999	Male	White				\$28,857	
Lambert	Michael Allen	1993	Male	White	\$188,041	\$5,788	\$29,956	\$0	\$0
Lowrimore	Steven	1995	Male	White	\$275,171	\$20,215		\$0	
Malinski	David	1999	Male	White		\$78,814			
McIntyre	Robert P.	1994	Male	White	\$57,627			\$0	\$0
Overstreet	Michael	1997	Male	White	\$201,906		\$1,427	\$5,578	
Rogers	Thomas Lee	1995	Male	White	\$68,101	\$22,467			\$0
Schmitt	Erick	1998	Male	White		\$7,481			\$0
Sherwood	Stephen	1996	Male	White	\$403,944			\$0	\$0
Stephenson	John	1996	Male	White	\$875,084	\$46,295	\$202,863		\$0
Stevens	Christopher	1994	Male	White	\$210,416	\$16,312	\$79,997	\$3,012	\$26,918
Timberlake	Norman	1993	Male	White	\$212,010		\$24,793	\$0	
Walls	James	1994	Male	White	\$345,223	\$24,678			\$0
Weatherford	Robert W., Sr.	1994	Male	White	\$336,887				
Wrinkles	Matthew	1994	Male	White	\$91,135		\$14,994	\$0	\$0
Average					\$215,608.38	\$46,375.50	\$54,355.00	\$2,340.44	\$8,471.69

Appendix B: Defendants in Cases In Which Life Without Parole was the Most Serious Sentence

Last	First	Year Charges Filed	Sex	Race	Adjusted Criminal Defense Costs	Adjusted Jury Costs	Adjusted Cost Of Appeals	Adjusted Prosecuting Attorney Costs	Adjusted Sheriff And Security Costs
Bostick	Amy	1998	Female	White	\$46,164	\$18,648	\$11,775	\$13,170	
Dunlop	Tracy	1994	Male	Black		\$3,539		\$0	
Logan	Sirlando	1996	Male	Black	\$3,969	\$10,791		\$0	
Miller	Ronnie	1995	Male	Black	\$90,352	\$12,499			
Alcorn	William	1993	Male	White	\$54,303				
Cox	Patrick	1995	Male	White	\$24,028	\$6,643	\$5,530		
Holsinger	Curtis	1997	Male	White		\$3,594		\$0	
Hubbard	Randall	1996	Male	White				\$0	\$572
Jones	Brian	1999	Male	White		\$31,753			\$7,481
Klein	Michael	1995	Male	White	\$0	\$6,829		\$0	
Long	Roger	1997	Male	White	\$72,243	\$12,827	\$5,947	\$6,886	\$6,887
Nicholson	Christopher	1997	Male	White	\$34,524	\$4,400	\$4,697		
Powers	Stephen	1996	Male	White		\$1,877	\$2,744	\$0	\$0
Redman	John	1998	Male	White	\$22,458	\$11,991	\$5,404	\$7,732	\$7,732
Russell	Jerry	1998	Male	White	\$36,329	\$13,105	\$6,029	\$6,898	\$3,605
Sowers	Larry	1998	Male	White	\$163,037	\$6,650		\$6,585	
Sturgeon	Charles	1995	Male	White		\$4,430	\$1,603	\$0	
West	Michael	1998	Male	White	\$0	\$12,818		\$0	
Averages:					\$45,617	\$10,150	\$5,466.	\$2,948	\$4,379.

Appendix C: Costs to Counties

At the county level, three different entities will incur costs for murder trials: the trial courts, the prosecuting attorney's office and the sheriff's office.

Trial courts incur the costs for indigent defense and the related costs of the defense for the defendant, the costs of the jury trials, including per diem costs for the jurors, meals, lodging when jurors are sequestered, transportation costs and other incidentals.

Under Criminal Rule 24, counties will pay more for the costs of indigent defense when a request for the death penalty has been filed. Criminal Rule 24(B)1 requires an indigent defendant to be represented by two attorneys who are experienced in death penalty cases and be paid \$90 per hour for the time of representation. The requirement for two attorneys does not apply in cases in which defendants employ counsel themselves. In addition, trial courts also pay for the costs of support services and incidental expenses including "Counsel appointed in a capital case shall be provided with adequate funds for investigative, expert and other services necessary to prepare and present an adequate defense at every stage of the proceeding, including the sentencing phase". Counties which comply with Criminal Rule 24 may receive reimbursement for 50% of the legal costs of the indigent defendant.

The Office of the Prosecuting Attorney in the judicial circuit may also incur costs outside of its budget to prosecute a death penalty case. These costs may be for additional investigations and expert witnesses. LSA sent a letter to prosecuting attorneys in 20 counties where a trial involving either the death penalty or life without parole had occurred. The letter requested to the prosecuting attorney to indicate whether the county council provided the prosecuting attorney with any additional funding for prosecuting a case. Of these cases involving either the death penalty or life without parole, information was available for 16 of the 28 death penalty cases and 14 of the 19 life without parole cases.

Depending on the type of case, the county sheriff may also incur overtime costs for providing security for the murder trial. LSA also sent a letter to county sheriffs in these 20 counties where a murder trial occurred to ask for overtime costs associated with these trials. Of the 28 death penalty trials, county sheriffs reported overtime costs incurred in 13 of these cases. Of the trials where life without parole was the most serious possibility, information was available for six of the 19 cases.

	Death Penalty		Life Without Parole	
	Average Costs	Number Of Cases	Average Costs	Number Of Cases
Attorneys and related costs	\$215,608	24	\$54,741	12
Jury and related costs	\$46,375	20	\$10,150	16
Cost of Appeals	\$54,355	10	\$5,466	8
Prosecuting Attorney	\$2,340	16	\$2,948	14
County Sheriff	\$8,472	13	\$4,380	6
Total Average Costs	\$327,151	28	\$77,684	19
Note: all costs are stated in 2001 dollars				

Appendix D: Costs to the Office of the Attorney General

The Office of the Attorney General represents the state in all stages of review at the state and federal level in death penalty cases. In cases involving life without parole, the Office of the Attorney General represents the state at the appeals level, and at the federal habeas level. LSA asked the AG's office to estimate the amount of staff time that is generally taken to represent the state at the different stages of review.

	Death Penalty	Life Without Parole
1) Direct Appeal	50 staff days	15 staff days
2) Post Conviction Relief (PCR)	65 staff days	State is represented by the prosecuting attorney
3) PCR Appeal	50 staff days	15 staff days
4) Habeas Corpus	35 staff days	10 staff days
5) HC Appeal	21 staff days	10 staff days
6) Cert at all stages (a capital defendant can seek certiorari in the United States Supreme Court at three stages - after direct appeal, after PCR appeal, and after habeas appeal).	21 staff days	
7) Execution (if a capital defendant fully challenges the execution)	60 staff days	

Based on an average salary of \$53,297³ and a 225 day work year, the costs associated at each stage of the review are shown in the following table

	Death Penalty	Life Without Parole
1) Direct Appeal	\$12,004	\$3,601
2) Post Conviction Relief (PCR)	\$15,605	State is represented by the prosecuting attorney
3) PCR Appeal	\$12,004	\$3,601
4) Habeas Corpus	\$8,403	\$2,401
5) HC Appeal	\$5,042	\$2,401
6) Cert At All Stages	\$5,042	
7) Execution	\$14,405	
Total Costs	\$72,503	\$12,004
Stated in 2001 dollars		

³ This includes state provided fringe benefits.

Appendix E: State Public Defender

The Office of the State Public Defender represents defendants in two stages of the review process: during post conviction relief and in the appeals from post conviction relief. LSA asked the State Public Defender to estimate the amount of staff time that is generally taken to represent criminal defendants in death penalty appeals and in Life Without Parole Appeals.

	Death Penalty		Life Without Parole	
	Attorneys	Investigators	Attorneys	Investigators
Post Conviction Relief	300 staff days	125 staff days	11 staff days	None
Post Conviction Relief Appeal	200 staff days	2 staff days		
Total	500 staff days	130 staff days	11 staff days	None

Based on the following Lead attorneys are the experienced attorneys and earn between \$66,000 and \$69,000 per year. The salaries of the less experienced co-counsels range between \$39,000 and \$60,000 per year. The salaries of investigators range between \$35,000 and \$41,600.⁴

	Death Penalty		Life Without Parole
	Attorneys	Investigators	Attorneys
Post Conviction Relief	\$101,563	\$21,565	\$3,724
Post Conviction Relief appeal	\$67,709	\$345	
	\$169,272	\$21,910	\$3,724
	\$191,182		\$3,724

⁴ The average salary costs include fringe benefits when making these cost estimates.

Appendix F: Indiana State Police

The Indiana State Police are involved with two activities associated with death penalty cases and cases involving life without parole. First, the state police provide security during the days leading up to the execution. Secondly, the state police also provide forensics analysis in certain capital cases. ***The Indiana State Police reported incurring \$4,012 in overtime during the execution of Gerald Bivins.*** Information was not able to be found for comparing the relative costs of forensics analysis in death penalty and non death penalty cases.

Appendix G: Department of Correction

The Department of Correction incurs costs for housing offenders committed to DOC facilities and in the case of offenders on death row executing them if their appeals expire.

To estimate these costs over time, the average annual cost for FY 2000 of \$18,709 for offenders in the Indiana State Prison is divided into two components: health care costs and all other costs. DOC reports that the average health care costs are \$2,800 per offender while all other costs would be \$15,909. These costs are separated to estimate for the added costs that older offenders would impose on DOC. To estimate these additional costs over time, the following table is used. Because aging offenders require additional health care services, an effort was made to also include the costs of health care for offenders sentenced to life without parole. Based on health care statistics that show the increase in expenditures for an elderly population, the following table was developed to represent these costs

Age Group	Imputed Costs
under 25	\$917
25 to 34	\$2,666
35 to 44	\$3,462
45 to 54	\$4,195
55 to 64	\$4,717
65 to 74	\$6,254
over 75	\$6,037

In addition to the costs of incarceration, the Department of Correction incurs a series of additional costs at the time of execution. These costs include staff overtime on the day of the execution, staff overtime associated with practices relating to scheduled execution, and yearly staff overtime from periodic practices that are not related to a particular scheduled execution. These estimates are based on the executions of Gerald Bivins in March, 2001 and James Lowery June, 2001.

Expenditure Description	Amount
Overtime for all ranks, administrative and clerical staff on day of execution	\$12,155
Chemicals, funeral arrangements, radios, food, physician services relating to execution	\$3,335
Staff overtime for weekly practices relating to scheduled execution	\$4,355
Central office travel expenses (mileage, hotel, per diem)	\$743
Total costs:	\$20,588

Besides these costs associated with specific executions, DOC reports monthly overtime practices that are not related to particular scheduled executions which costs \$17,421.

Appendix H: Comparing the Costs of the Death Penalty and Life Without Parole for the "Typical" Offender

Death Penalty											
Age	Attorney s and related costs	Jury and related costs	County Sheriff	Prosecutin g Attorney	State Police	Office of the Attorne y General	State Public Defender' s Office	Departmen t of Correction	DOC executio n costs	Offende r Medical Costs	Total Cost
30	\$215,608	\$46,375	\$8,472	\$2,340							\$272,796
31	\$10,026					\$4,428		\$16,737		\$2,666	\$33,857
32	\$10,547					\$4,658		\$17,608		\$2,666	\$35,479
33	\$11,096					\$4,901		\$18,523		\$2,666	\$37,185
34						\$6,763	\$49,267	\$19,486		\$2,666	\$78,182
35						\$7,115	\$51,829	\$20,500		\$3,462	\$82,905
36						\$7,485	\$54,524	\$21,566		\$3,462	\$87,036
37						\$7,874	\$57,359	\$22,687		\$3,462	\$91,382
38						\$8,283	\$60,342	\$23,867		\$3,462	\$95,953
39						\$12,134		\$25,108		\$3,462	\$40,704
40						\$12,765		\$26,413		\$3,462	\$42,640
41					\$7,371	\$33,181		\$15,938	\$37,827	\$3,462	\$97,779

Life Without Parole										
Age	Attorneys and related costs	Jury and related costs	County Sheriff	Prosecuting Attorney	State Police	Office of the Attorney General	State Public Defender's Office	Department of Correction	Offender Medical Costs	Total Cost
30	\$45,617	\$10,150	\$4,380	\$2,948						\$63,094
31	\$3,025					\$1,993		\$16,737	\$2,804	\$24,559
32	\$3,182					\$2,096		\$17,608	\$2,950	\$25,836
33							\$675	\$18,523	\$3,104	\$22,302
34							\$710	\$19,486	\$3,265	\$23,461
35							\$747	\$20,500	\$4,692	\$25,939
36							\$786	\$21,566	\$4,936	\$27,288
37							\$827	\$22,687	\$5,193	\$28,706
38						\$6,189	\$870	\$23,867	\$5,463	\$36,389
39								\$25,108	\$5,747	\$30,855
40								\$26,413	\$6,046	\$32,459
41								\$27,787	\$6,360	\$34,147
42								\$29,232	\$6,691	\$35,923
43								\$30,752	\$7,039	\$37,790
44								\$32,351	\$7,405	\$39,756
45								\$34,033	\$9,440	\$43,473
46								\$35,803	\$9,931	\$45,734
47								\$37,665	\$10,447	\$48,112
48								\$39,623	\$10,990	\$50,614
49								\$41,684	\$11,562	\$53,245
50								\$43,851	\$12,163	\$56,014
51								\$46,132	\$12,795	\$58,927
52								\$48,530	\$13,461	\$61,991
53								\$51,054	\$14,161	\$65,215
54								\$53,709	\$14,897	\$68,606
55								\$56,502	\$11,166	\$67,668
56								\$59,440	\$11,747	\$71,187
57								\$62,531	\$12,358	\$74,888
58								\$65,782	\$13,000	\$78,782
59								\$69,203	\$13,676	\$82,879
60								\$72,801	\$14,387	\$87,189
61								\$76,587	\$15,136	\$91,723
62								\$80,570	\$15,923	\$96,492
63								\$84,759	\$16,751	\$101,510
64								\$89,167	\$17,622	\$106,788
65								\$93,803	\$14,807	\$108,610

66								\$98,681	\$15,577	\$114,258
67								\$103,813	\$16,387	\$120,199
68								\$109,211	\$17,239	\$126,449
69								\$114,890	\$18,135	\$133,025
70								\$120,864	\$19,078	\$139,942
71								\$127,149	\$20,070	\$147,219
72								\$133,761	\$21,114	\$154,874
73								\$140,716	\$22,212	\$162,928
74								\$148,033	\$23,367	\$171,400
75								\$155,731	\$14,291	\$170,022
76								\$163,829	\$15,034	\$178,863
77								\$172,348	\$15,816	\$188,164

Appendix I: Number of Years Offenders Will Likely Remain in Prison Until Death Based on Age at Time of Sentencing

Age At Time of Sentencing	Number of Years in Prison Until Death			
	White Male	White Female	Black Male	Black Female
16	58.7	64.3	51.6	59.5
17	57.7	63.3	50.7	58.6
18	56.8	62.4	49.8	57.6
19	55.8	61.4	48.9	56.6
20	54.9	60.4	48	55.7
21	54	59.5	47.2	54.7
22	53	58.5	46.3	53.7
23	52.1	57.5	45.5	52.8
24	51.2	56.5	44.6	51.8
25	50.2	55.6	43.7	50.9
26	49.3	54.6	42.8	49.9
27	48.4	53.6	42	49
28	47.4	52.6	41.1	48
29	46.5	51.7	40.2	47.1
30	45.6	50.7	39.4	46.2
31	44.6	49.7	38.5	45.2
32	43.7	48.8	37.6	44.3
33	42.8	47.8	36.8	43.4
34	41.9	46.8	36	42.5
35	40.9	45.9	35.1	41.6
36	40	44.9	34.3	40.7
37	39.1	43.9	33.4	39.8
38	38.2	43	32.6	38.9
39	37.3	42	31.8	38
40	36.4	41.1	31	37.1
41	35.5	40.1	30.2	36.2
42	34.6	39.2	29.4	35.3
43	33.7	38.2	28.6	34.5
44	32.8	37.3	27.8	33.6
45	31.9	36.4	27.1	32.8
46	31	35.4	26.3	31.9
47	30.1	34.5	25.6	31
48	29.2	33.6	24.8	30.2
49	28.4	32.7	24.1	29.4

Source: Table 129, Expectation of Life and Expected Deaths by Race, Sex and Age, 1996, **Statistical Abstract of the United States, The National Data Book, 1999**

Appendix J: Systemic Costs of Death Penalty
Scenario 1: Assumes All Current Offenders on Death Row Are Executed

	Death Penalty Executed Costs	Death Penalty Executed Beds Needed	Death Penalty Reversed	Death Penalty Reversed Beds Needed	Death Penalty Total Costs	Death Penalty Beds Needed
1979	\$305,308	1	\$0	0	\$305,308	1
1980	\$962,891	4	\$0	0	\$962,891	4
1981	\$1,138,522	7	\$635,207	2	\$1,773,728	9
1982	\$1,280,322	9	\$424,775	3	\$1,705,097	12
1983	\$1,132,499	11	\$1,201,098	6	\$2,333,596	17
1984	\$1,681,415	14	\$1,799,805	10	\$3,481,220	24
1985	\$1,130,500	15	\$3,611,910	17	\$4,742,410	32
1986	\$2,803,325	19	\$2,204,200	20	\$5,007,525	39
1987	\$2,313,160	22	\$1,212,596	20	\$3,525,756	42
1988	\$2,686,302	24	\$3,508,939	25	\$6,195,241	49
1989	\$1,597,545	24	\$2,582,041	27	\$4,179,586	51
1990	\$3,214,943	27	\$1,901,064	27	\$5,116,008	54
1991	\$2,591,068	28	\$3,087,679	29	\$5,678,747	57
1992	\$3,901,875	31	\$2,292,228	28	\$6,194,102	59
1993	\$3,911,691	33	\$2,255,554	28	\$6,167,245	61
1994	\$3,997,848	34	\$2,163,456	29	\$6,161,304	63
1995	\$5,404,446	36	\$2,136,355	29	\$7,540,802	65
1996	\$5,244,563	38	\$2,015,011	29	\$7,259,574	67
1997	\$5,093,777	38	\$1,883,239	29	\$6,977,017	67
1998	\$5,771,481	38	\$2,829,256	30	\$8,600,736	68
1999	\$6,240,116	38	\$2,317,147	30	\$8,557,262	68
2000	\$6,695,055	39	\$2,119,464	30	\$8,814,519	69
2001	\$4,608,468	39	\$2,214,687	30	\$6,823,155	69
2002	\$6,186,646	37	\$2,078,775	29	\$8,265,421	66
2003	\$4,297,618	22	\$2,121,585	29	\$6,419,203	51
2004	\$2,469,972	14	\$2,241,520	29	\$4,711,492	43
2005	\$2,286,154	12	\$2,372,483	29	\$4,658,637	41
2006	\$2,234,331	10	\$2,507,396	29	\$4,741,727	39
2007	\$1,414,120	6	\$2,647,346	29	\$4,061,466	35
2008	\$1,348,207	5	\$2,794,105	29	\$4,142,312	34
2009	\$449,396	3	\$2,946,455	29	\$3,395,851	32
2010	\$660,703	3	\$3,103,383	29	\$3,764,086	32
2011	\$756,175	2	\$3,056,602	27	\$3,812,777	29
2012	\$0	0	\$3,224,160	27	\$3,224,160	27
2013	\$0	0	\$3,014,309	24	\$3,014,309	24
2014	\$0	0	\$3,058,538	23	\$3,058,538	23
2015	\$0	0	\$2,807,832	20	\$2,807,832	20

	Death Penalty Executed Costs	Death Penalty Executed Beds Needed	Death Penalty Reversed	Death Penalty Reversed Beds Needed	Death Penalty Total Costs	Death Penalty Beds Needed
2016	\$0	0	\$2,808,664	19	\$2,808,664	19
2017	\$0	0	\$2,794,026	18	\$2,794,026	18
2018	\$0	0	\$2,626,894	16	\$2,626,894	16
2019	\$0	0	\$2,600,378	15	\$2,600,378	15
2020	\$0	0	\$2,739,986	15	\$2,739,986	15
2021	\$0	0	\$2,900,677	15	\$2,900,677	15
2022	\$0	0	\$2,849,872	14	\$2,849,872	14
2023	\$0	0	\$2,998,066	14	\$2,998,066	14
2024	\$0	0	\$3,167,557	14	\$3,167,557	14
2025	\$0	0	\$3,118,862	13	\$3,118,862	13
2026	\$0	0	\$3,281,043	13	\$3,281,043	13
2027	\$0	0	\$3,470,084	13	\$3,470,084	13
2028	\$0	0	\$3,399,331	12	\$3,399,331	12
2029	\$0	0	\$3,616,882	12	\$3,616,882	12
2030	\$0	0	\$3,508,534	11	\$3,508,534	11
2031	\$0	0	\$3,710,360	11	\$3,710,360	11
2032	\$0	0	\$3,903,298	11	\$3,903,298	11
2033	\$0	0	\$4,106,270	11	\$4,106,270	11
2034	\$0	0	\$3,926,750	10	\$3,926,750	10
2035	\$0	0	\$4,123,136	10	\$4,123,136	10
2036	\$0	0	\$3,471,673	8	\$3,471,673	8
2037	\$0	0	\$3,194,595	7	\$3,194,595	7
2038	\$0	0	\$3,351,627	7	\$3,351,627	7
2039	\$0	0	\$2,517,826	5	\$2,517,826	5
2040	\$0	0	\$2,115,985	4	\$2,115,985	4
2041	\$0	0	\$1,665,545	3	\$1,665,545	3
2042	\$0	0	\$1,752,153	3	\$1,752,153	3
2043	\$0	0	\$1,843,265	3	\$1,843,265	3
2044	\$0	0	\$1,939,115	3	\$1,939,115	3
2045	\$0	0	\$679,983	1	\$679,983	1
2046	\$0	0	\$715,342	1	\$715,342	1

Scenario 2: Assumes Death Sentences of 20% of Current Offenders on Death Row Are Reversed

	Life Without Parole Executed Costs	Life Without Parole Executed Beds Needed	Life Without Parole Reversed	Life Without Parole Reversed Beds Needed	Life Without Parole Total Costs	Life Without Parole Beds Needed
1979	\$66,375	1	\$0	0	\$66,375	1
1980	\$232,363	4	\$0	0	\$232,363	4
1981	\$324,554	7	\$146,916	2	\$471,469	9
1982	\$424,806	10	\$127,927	3	\$552,732	13
1983	\$450,278	12	\$323,812	6	\$774,090	18
1984	\$616,608	15	\$512,625	10	\$1,129,233	25
1985	\$553,572	16	\$1,022,636	18	\$1,576,208	34
1986	\$988,134	21	\$866,501	21	\$1,854,634	42
1987	\$1,015,172	24	\$715,661	21	\$1,730,832	45
1988	\$1,171,868	27	\$1,271,822	26	\$2,443,690	53
1989	\$1,022,804	27	\$1,194,285	28	\$2,217,089	55
1990	\$1,413,889	30	\$1,105,011	28	\$2,518,900	58
1991	\$1,379,203	31	\$1,414,524	30	\$2,793,727	61
1992	\$1,734,246	34	\$1,259,954	29	\$2,994,200	63
1993	\$1,825,204	36	\$1,284,696	28	\$3,109,900	64
1994	\$1,870,665	37	\$1,364,918	28	\$3,235,583	65
1995	\$2,314,245	40	\$1,421,854	28	\$3,736,099	68
1996	\$2,445,118	42	\$1,453,065	28	\$3,898,183	70
1997	\$2,509,142	43	\$1,528,269	28	\$4,037,411	71
1998	\$2,683,865	44	\$1,793,208	29	\$4,477,074	73
1999	\$2,871,027	45	\$1,744,903	29	\$4,615,930	74
2000	\$3,281,629	47	\$1,829,129	29	\$5,110,758	76
2001	\$3,190,033	47	\$1,930,825	29	\$5,120,858	76
2002	\$3,362,931	47	\$2,011,523	29	\$5,374,454	76
2003	\$3,520,878	47	\$2,126,787	29	\$5,647,665	76
2004	\$3,697,227	47	\$2,246,993	29	\$5,944,220	76
2005	\$3,897,515	47	\$2,378,241	29	\$6,275,756	76
2006	\$4,082,884	47	\$2,513,454	29	\$6,596,338	76
2007	\$4,291,406	47	\$2,657,788	29	\$6,949,195	76
2008	\$4,517,918	47	\$2,805,090	29	\$7,323,008	76
2009	\$4,762,385	47	\$2,948,968	29	\$7,711,352	76
2010	\$5,011,969	47	\$3,106,026	29	\$8,117,996	76
2011	\$5,282,322	47	\$3,059,383	27	\$8,341,705	74
2012	\$5,589,481	47	\$3,227,085	27	\$8,816,566	74
2013	\$5,894,932	47	\$3,149,863	25	\$9,044,795	72
2014	\$6,090,300	46	\$3,071,309	23	\$9,161,609	69
2015	\$6,435,243	46	\$2,821,267	20	\$9,256,510	66
2016	\$6,805,110	46	\$2,822,798	19	\$9,627,908	65
2017	\$7,175,577	46	\$2,973,353	19	\$10,148,931	65

	Life Without Parole Executed Costs	Life Without Parole Executed Beds Needed	Life Without Parole Reversed	Life Without Parole Reversed Beds Needed	Life Without Parole Total Costs	Life Without Parole Beds Needed
2018	\$7,560,604	46	\$2,815,547	17	\$10,376,151	63
2019	\$7,986,666	46	\$2,624,945	15	\$10,611,611	61
2020	\$8,429,834	46	\$2,765,831	15	\$11,195,665	61
2021	\$8,927,957	46	\$2,925,946	15	\$11,853,903	61
2022	\$9,417,045	46	\$3,076,076	15	\$12,493,120	61
2023	\$9,724,118	45	\$3,236,032	15	\$12,960,150	60
2024	\$9,793,306	43	\$3,183,384	14	\$12,976,690	57
2025	\$9,824,394	41	\$3,135,512	13	\$12,959,907	54
2026	\$10,347,833	41	\$3,298,559	13	\$13,646,392	54
2027	\$10,674,425	40	\$3,488,511	13	\$14,162,936	53
2028	\$10,425,958	37	\$3,418,716	12	\$13,844,674	49
2029	\$11,003,136	37	\$3,614,002	12	\$14,617,138	49
2030	\$11,622,462	37	\$3,505,505	11	\$15,127,967	48
2031	\$12,259,222	37	\$3,707,173	11	\$15,966,396	48
2032	\$12,612,779	36	\$3,899,946	11	\$16,512,725	47
2033	\$11,461,087	31	\$4,102,744	11	\$15,563,831	42
2034	\$12,075,920	31	\$3,923,040	10	\$15,998,960	41
2035	\$12,318,026	30	\$4,119,233	10	\$16,437,259	40
2036	\$11,230,937	26	\$3,471,673	8	\$14,702,611	34
2037	\$10,926,009	24	\$3,194,595	7	\$14,120,605	31
2038	\$10,526,818	22	\$3,351,627	7	\$13,878,445	29
2039	\$10,061,346	20	\$2,517,826	5	\$12,579,171	25
2040	\$9,026,878	17	\$2,115,985	4	\$11,142,863	21
2041	\$7,820,151	14	\$1,665,545	3	\$9,485,696	17
2042	\$7,626,053	13	\$1,752,153	3	\$9,378,206	16
2043	\$8,010,899	13	\$1,843,265	3	\$9,854,164	16
2044	\$6,482,192	10	\$1,939,115	3	\$8,421,307	13
2045	\$6,132,804	9	\$679,983	1	\$6,812,787	10
2046	\$5,021,026	7	\$715,342	1	\$5,736,368	8
2047	\$5,274,949	7	\$0	0	\$5,274,949	7
2048	\$4,757,574	6	\$0	0	\$4,757,574	6
2049	\$3,339,291	4	\$0	0	\$3,339,291	4
2050	\$1,752,293	2	\$0	0	\$1,752,293	2
2051	\$921,706	1	\$0	0	\$921,706	1

V.

Whether Indiana imposes capital sentencing in a race neutral manner

The Criminal Law Study Commission asked the Indiana Criminal Justice Institute to conduct research examining whether Indiana capital sentences are imposed in a race-neutral manner. Mary Ziemba-Davis, the Institute's research director, assembled a research team, presented a research proposal that was approved by the Commission, and provided the Commission with regular status reports on her team's work. The Commission adopted the resulting research and conclusions after reviewing the research on an ongoing basis and the final study report written by Mary Ziemba-Davis and Brent L. Myers, the Institute's senior research associate. Kathy Lisby, director of planning for the Indiana Department of Correction, provided research assistance. *Sentencing Outcomes for Murder in Indiana: Initial Findings* appears below and comprises this report's section V, "Whether Indiana imposes capital sentencing in a race neutral manner."

SENTENCING OUTCOMES FOR MURDER IN INDIANA: INITIAL FINDINGS¹

Introduction

Research examining the relationship between race and the death penalty in particular states and localities during the last several decades has been synthesized and evaluated in two widely-cited reviews. At the request of the United States Senate, the U.S. General Accounting Office (GAO, 1990) examined research conducted after the Supreme Court's 1972 ruling in *Furman v. Georgia* that resulted in amended death penalty statutes across the United States. Including many pre-*Furman* studies, the second review (Kleck, 1981) evaluated death penalty studies conducted prior to 1976. Half of all studies examined by the GAO (1990) found that Blacks were more likely than Whites to be sentenced to death, but the GAO report concluded that the effect of offender race is unclear because the effect was inconsistent across studies and often interacted with other factors such as the victim's race. Kleck (1981) found little evidence that the race of an offender determined whether or not he or she would be sentenced to death. Although findings historically have been mixed, a leading death penalty scientist recently noted that "most studies indicate that the race of the defendant does not generally effect the likelihood that the defendant will receive the death penalty" (Baldus, Woodworth, Young, & Christ, 2001, p. 25).

The GAO (1990) review and Kleck's (1981) earlier review presented strong evidence, however, for a main effect involving victim race, even when legally relevant variables are taken into account. Regardless of the defendant's race, murders involving White victims were more likely to result in a death sentence than murders involving Black victims. As noted in the GAO report (1990, p. 5), this finding "was remarkably consistent across data sets, states, data collection methods, and analytic techniques." Thus, it has been well-established that the likelihood of receiving a death sentence for murder can be influenced by the victim's race or interactions between victim and offender race. Recent studies employing advanced methods to examine the relationship between race and the application of the death penalty have demonstrated that effects by race can be sensitive to geographic location both within and between states, and can vary based on the severity of the crime (Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, 1998; Baldus et al., 2001).

Baldus et al. (1998) and others (GAO, 1990) have addressed the significant variation in methodologies employed in empirical studies on the death penalty and race. Often due to the high cost (in terms of both money and time) and considerable complexity of sentencing studies, many death penalty studies have not moved beyond descriptive comparisons of sentencing disparities by race (referred to as "gross unadjusted" racial disparities by Baldus and colleagues, 1998) to control for the many possible causes of sentencing disparities which may or may not be correlated with race (i.e., "adjusted" racial disparities). Adjusted disparities account for case characteristics such as aggravating and mitigating factors that may legitimately influence decision-making in a criminal case (Baldus et al., 1998). As Baldus and his colleagues (1998, p. 1655) noted:

Adjusted disparities permit one to compare the treatment of offenders who share similar levels of aggravation and mitigation, which, when considered together, determine a defendant's criminal culpability and

¹ This report was written by Mary Ziemba-Davis and Brent L. Myers of the Indiana Criminal Justice Institute. Research assistance was provided by Kathy Lisby of the Indiana Department of Correction.

blameworthiness. The failure of a statistical analysis to use adjusted disparities introduces a significant risk of erroneous inferences about the influence of race in the system.

Defining reasonably well-controlled studies as those “having statistical controls for ten or more² legitimate nonracial case characteristics” (such as offender culpability and aggravating and mitigating circumstances), Baldus et al. (1998) noted that well-controlled studies have been conducted in only nine states – California, Colorado, Georgia, Kentucky, Mississippi, New Jersey, North Carolina, Pennsylvania, and South Carolina.

The Current Study

Representing the first comprehensive study of sentences received for murder in Indiana,³ *Sentencing Outcomes for Murder in Indiana* was designed to examine offender and victim race along with approximately 100 ‘legitimate nonracial case characteristics’ from cases resulting in murder convictions to determine which of those facts are significantly related to the sentence that offenders received.⁴ Detailed facts about the defendant; the victims; the crime; and the trial, conviction and sentencing processes are being examined.

Indiana’s revised death penalty statute has been available as a sentencing option since October 1, 1977. Determinate sentences (i.e., fixed-terms of incarceration) for murder also have been an option since that time. Life without the possibility of parole, however, was not instituted as a sentencing option for murder in Indiana until July 1, 1993. Thus, in Indiana, comparisons of offenders by sentence type must be limited to (a) comparisons of those who committed their crime between October 1, 1977 and June 30, 1993 and received either the death penalty or a fixed-term or (b) comparisons of those who committed their crime since July 1, 1993 and received death, life without parole, or a fixed-term. This initial report presents a subset of information from the larger study for offenders who committed their crimes on or after July 1, 1993 and received one of three possible sentences for murder, namely, the death penalty, life without parole, or a fixed-term. Specifically, demographic information for the perpetrators and the victims of these crimes is presented along with findings comparing the race of defendants and the interaction between defendant and victim race in each of the three sentence groups. Details about the methods used for the initial report are presented below.

Study Method

Individuals who received a death sentence, life without parole, or a determinate sentence for murders committed between July 1, 1993 (the effective date of Indiana’s life without parole statute) and August 10, 2001 (the cut-off date for inclusion in the study) are the

² Some of Professor Baldus’ studies have controlled for 100 or more legitimate case characteristics.

³ An unpublished examination of the relationship between race of the victim and the decision to charge the death penalty in Marion County Indiana between 1979 and 1989 was conducted by Dr. Catherine Melfi and Dr. Xaio-Hua Zhou of the Indiana University School of Medicine’s Division of Biostatistics in 1992. A principal finding was that the odds of the death penalty being charged was 3.7 times higher in cases involving White victims than in cases involving Black victims.

⁴ The focus of the present study is sentences received for murder once a conviction has been obtained. It is not a study of the prevalence of murder by race, arrests for murder by race, charging practices for murder by race, or convictions for murder by race. Although these issues are all relevant to the justice system process and important concerns to society at large, they are beyond the scope of the current study.

focus of these initial findings. Persons convicted of attempted murder, conspiracy to commit murder, or aiding in the cause of murder were not included in the study population.

As Table 1 shows, the subjects examined in the initial findings report can be categorized in one of three groups based on the type of sentence they received.

Table 1: Study Subjects by Type of Sentence Received		
Sentence Type	Number of Subjects	Notes
Death Penalty	10	Regardless of final case outcome, initial findings cover 10 death penalty offenders who committed murder between July 1, 1993 and August 10, 2001. (Since October 1, 1977, a total of 87 offenders have received the death penalty in Indiana for murders committed on or before August 10, 2001. This figure counts one offender twice because he received two death sentences in different counties for different murders.)
Life Without Parole	58	Regardless of final case outcome, initial findings cover all 58 offenders sentenced to life without parole for murders committed between July 1, 1993 and August 10, 2001.
Determinate	156	Initial findings represent a random sample of the 831 offenders who received a determinate sentence for murders committed between July 1, 1993 and August 10, 2001, regardless of final case outcome.
<i>Total</i>	<i>224</i>	

Random sampling within offender race⁵ was used to select a representative subset of determinate offenders for inclusion in this initial findings report. We selected a sampling strategy for determinate offenders that permits us to say that 95 out of 100 times a result will be representative of all Non-White or White determinate offenders from which the sample was drawn, plus or minus 10%.⁶ Thus, for example, a finding that 61% of White (or Non-White) determinate offenders in our sample killed White victims statistically means that with 95% certainty the true population value for White (or Non-White) determinate offenders may range from 51% to 71%. Unlike determinate offenders, it is important to note that findings for offenders who received life without parole or death reflect the true population value because *all* offenders in these two groups who were convicted of murders committed between July 1, 1993 and August 10, 2001 were included in the study population. Thus, for example, findings that 32% of White life without parole offenders and 8% of White death penalty offenders killed White victims do not have to be placed in the context of a range of possible true population values.

⁵ Stratifying by offense year or sentence year was not necessary when drawing the determinate sample for initial findings because all offenders who committed murder since July 1, 1993 were still represented in the prison population when the sample was drawn.

⁶ For the larger full study, we expect a 95% confidence level with a +/- 5% error rate for the determinate sample.

Initial Findings

The focus of this initial findings report is 224 offenders convicted in Indiana of murders committed between July 1, 1993 and August 10, 2001.⁷ One-hundred and fifty-six (69.6%) received a determinate sentence, 58 (25.9%) received life without parole, and 10 (4.5%) received the death penalty.⁸ Demographic characteristics for these offenders, including their age at the time of the crime, are presented by type of sentence received in Table 2. Column percentages, rather than row percentages, are presented in Table 2 to facilitate demographic comparisons across sentence types. For example, Table 2 shows that women represent 6% of all determinate offenders but only 2% of offenders given life without parole and none of the offenders sentenced to death for murders committed since July 1, 1993.

Before turning to comparisons by race, it is interesting to note the slightly different patterns in highest education level attained and age at time of the offense for death penalty offenders compared to those who received one of the other two sentence types. Death penalty offenders appear to be slightly better educated (but only to a point) and slightly older at the time of their offense.

Table 2 indicates that 49% of determinate offenders, 69% of life without parole offenders, and 90% of death penalty offenders are White. In comparison, Non-White offenders represent 51% of determinate offenders, 31% of those who received life without parole, and 10% of offenders who received the death penalty. It is important to note that these statistics say nothing about the role of offender race, if any, in sentencing practices for murder. They simply describe the distribution of offenders within each sentence type in terms of race. There is no comparative standard, including the breakdown by race in the population at large, which suggests that White offenders and Non-White offenders should be distributed in a particular way across different sentence types (equally, proportionate to the general population, or otherwise). If all of the offenders sentenced to death are equally culpable in terms of their crime and similar in other relevant respects (such as the mitigating circumstances surrounding their crime), they are all fairly sentenced without regard to race. Stated another way, Non-White offenders who received the death penalty should be more similar to White offenders who received the death penalty than to either Non-White or White offenders in each of the other two sentence groups. Information in Table 2 says nothing about disproportionate *treatment* based on race when relevant case facts are held constant for offenders who otherwise differ only by race. As Baldus et al. (1998) have discussed, the issue of primary concern is whether similarly culpable offenders are treated the same.

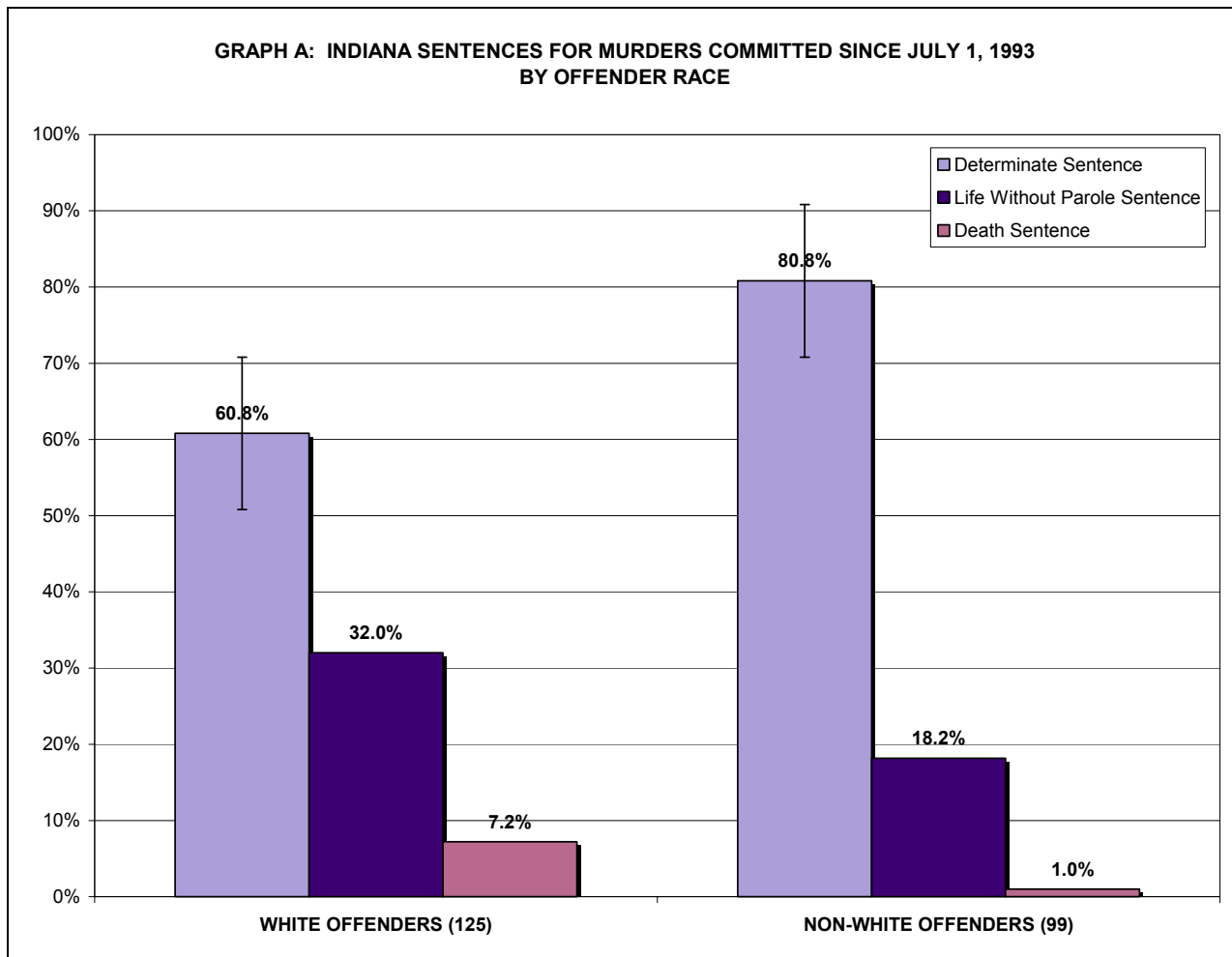
⁷ The 224 offenders included in this report are a subset of the total population of 975 individuals convicted of murder between July 1, 1993 and August 10, 2001. In the total population of offenders, 831 (85.2%) received a determinate sentence, 58 (6.0%) received life without parole, and 86 (8.8%) received the death penalty.

⁸ The 10 death penalty offenders included in the initial findings report are compared to the 77 offenders who received the death penalty for murders committed prior to July 1, 1993 in Appendix A.

Table 2: Demographic Characteristics of Offenders by Sentence Type

	Number			Percent		
	Determinate Offenders	Life Without Parole Offenders	Death Penalty Offenders	Determinate Offenders	Life Without Parole Offenders	Death Penalty Offenders
Sex						
Male	147	57	10	94.2	98.3	100.0
Female	9	1	0	5.8	1.7	0.0
<i>Total</i>	<i>156</i>	<i>58</i>	<i>10</i>	<i>100.0</i>	<i>100.0</i>	<i>100.0</i>
Race						
Asian American/Pacific Islander	1	0	0	0.6	0.0	0.0
Black/African American	74	15	1	47.4	25.9	10.0
Hispanic	5	3	0	3.2	5.2	0.0
White/Caucasian	76	40	9	48.7	69.0	90.0
<i>Total</i>	<i>156</i>	<i>58</i>	<i>10</i>	<i>100.0</i>	<i>100.0</i>	<i>100.0</i>
Race Category						
White	76	40	9	48.7	69.0	90.0
Non-White	80	18	1	51.3	31.0	10.0
<i>Total</i>	<i>156</i>	<i>58</i>	<i>10</i>	<i>100.0</i>	<i>100.0</i>	<i>100.0</i>
Highest Education Level Completed						
Less Than 8th Grade	8	3	0	5.1	5.2	0.0
8th-12th Grade without HS diploma/GED	108	40	8	69.2	69.0	80.0
HS Diploma or Advanced Study	40	15	2	25.6	25.9	20.0
<i>Total</i>	<i>156</i>	<i>58</i>	<i>10</i>	<i>100.0</i>	<i>100.0</i>	<i>100.0</i>
Age at Offense in Years						
Mean	28.0	27.0	33.2			
Standard Deviation	9.1	8.6	8.3			
Mode	18 & 19	20	31			
Minimum	16	16	21			
Maximum	58	56	47			
Notes: Information on the highest level of education completed was self-reported by offenders either on Presentence Investigation Reports or upon intake to the Indiana Department of Correction. The standard deviation is a measure of how scores are dispersed around the mean. In a normal distribution, 68% of cases fall within one standard deviation of the mean in either direction. Thus, for example, if the mean age at offense is 28 and the standard deviation is 9, for 68% of all cases, the age at offense is between 19 and 37 years. The mode is the most frequently occurring age at offense.						

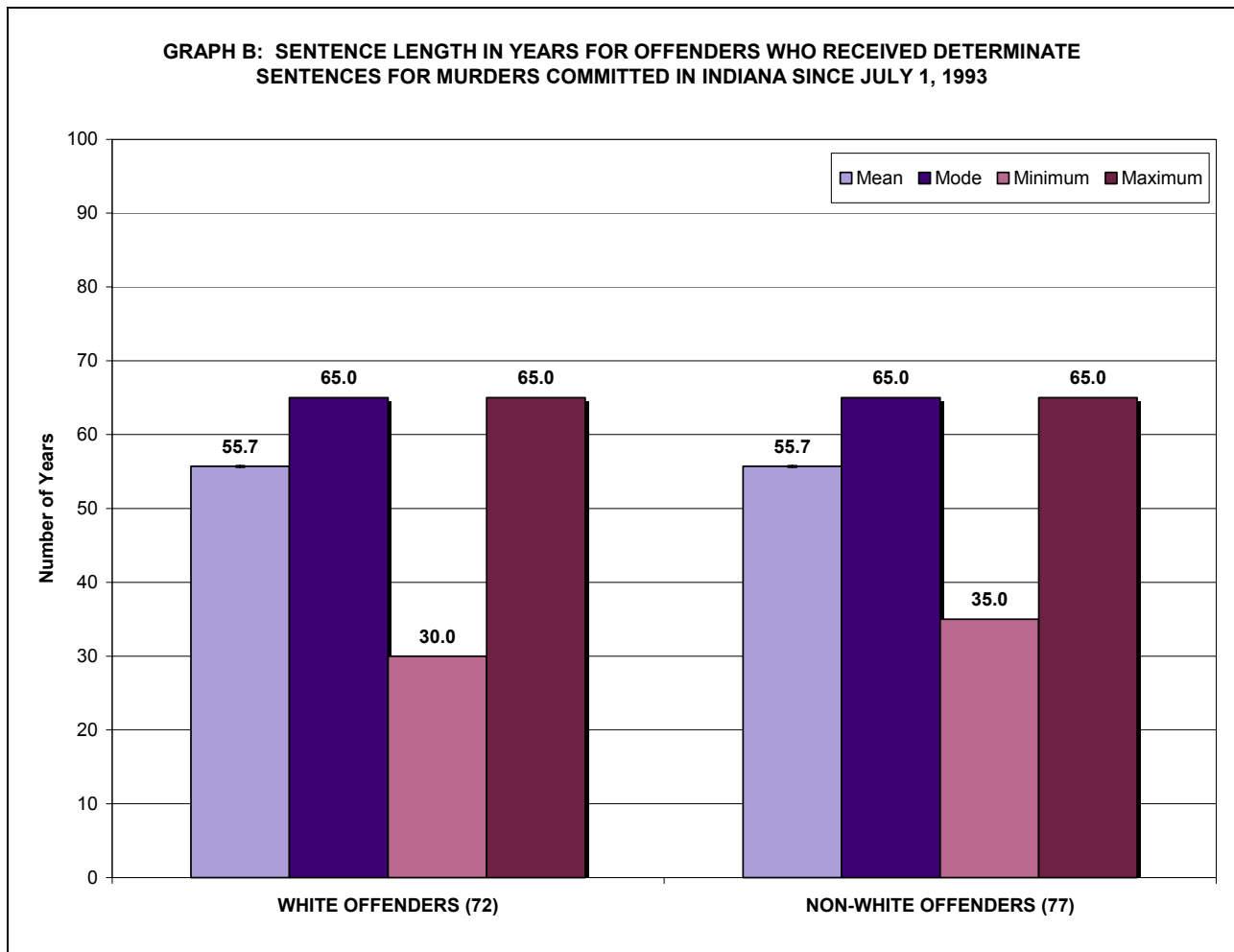
The severity of sentences received for murder can be examined *within race*, rather than within sentence type as presented in Table 2. Graph A presents the percentage of all White offenders who committed murder since July 1, 1993 who received each sentence type and the percentage of all Non-White offenders who received each sentence type. If it can be assumed that, in general, White offenders and Non-White offenders are equally culpable, the distribution of sentences by race should be roughly the same. As Graph A indicates, however, as a group, White offenders received more severe sentences for murder than Non-White offenders.⁹ The underlying cause of this race difference is not yet known.



Notes: Error bars for determinate offenders indicate that the true population value may range by +/- 10%.

⁹ It is difficult to directly compare Indiana data on sentence type by offender race to data from other states because information presented in Graph A uniquely represents offenders who committed murder since July 1, 1993. Graph A also represents offenders who received one of the three sentences of interest regardless of final case outcome, whereas many other studies have examined only those offenders still on death row or whose death sentences were upheld. Although it is not directly comparable to information provided in Graph A, a state-by-state comparison of the proportion of offenders by race who were under a sentence of death on December 31, 2000 is presented in Appendix B.

There does not appear to be a difference by race in the sentence length in years among White and Non-White offenders who received a determinate sentence for murders committed since July 1, 1993 (see Graph B).

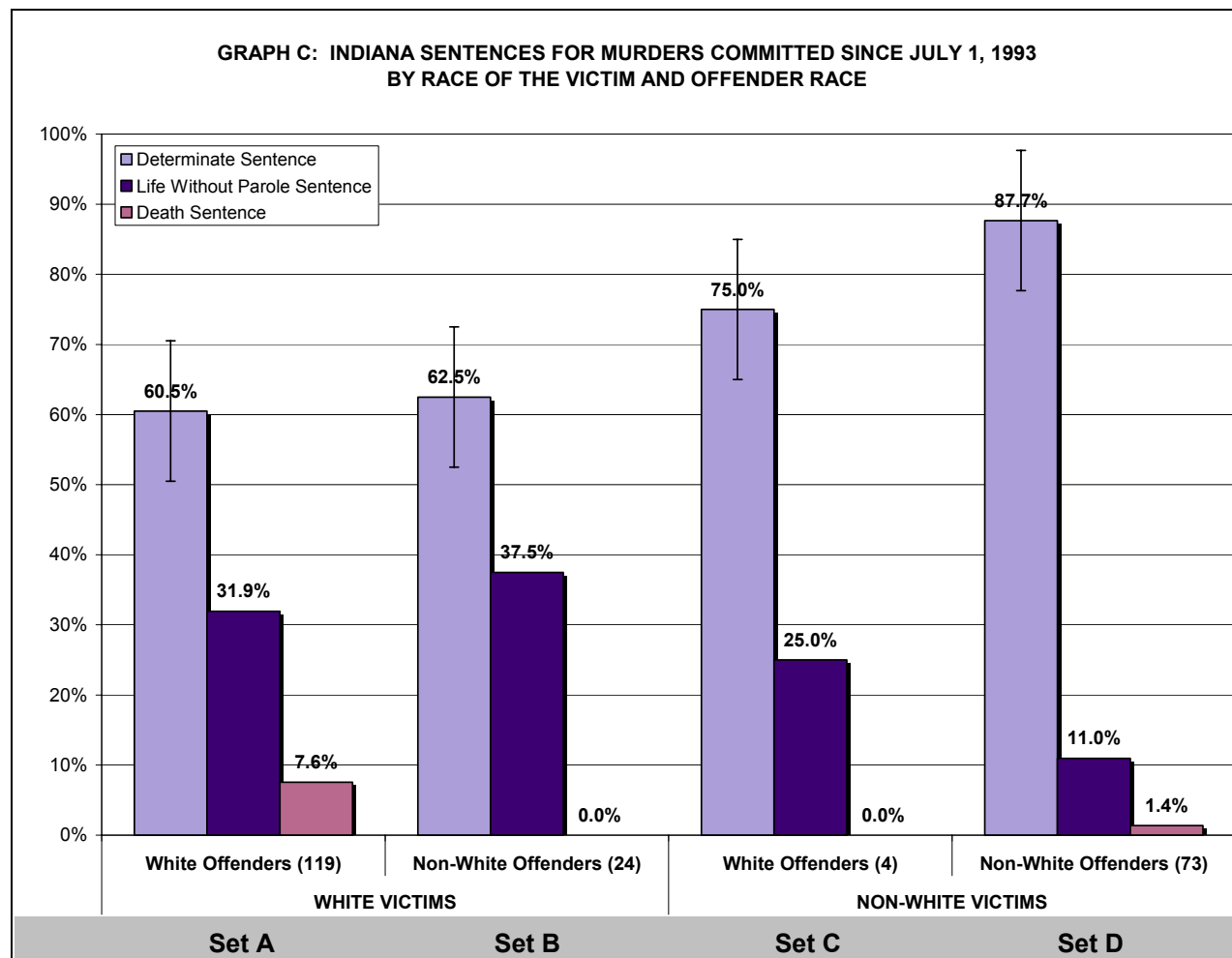


Notes: Only sentence lengths for the 96% of determinate offenders who murdered one victim are shown. The mode is the most frequently occurring sentence length.

The number and demographic characteristics of victims killed by offenders is presented by sentence type in Table 3. Again, column percentages, not row percentages, are presented to facilitate type of victim comparisons for offenders by sentence type. For example, Table 3 shows that very few determinate offenders (4%) had multiple victims compared to offenders who received life without parole (26%) or the death penalty (60%).

Table 3: Characteristics of Victims by Offender Sentence Type						
	Number			Percent		
	Determinate Offenders	Life Without Parole Offenders	Death Penalty Offenders	Determinate Offenders	Life Without Parole Offenders	Death Penalty Offenders
Number of Victims						
Mean	1.1	1.4	2.2			
Standard Deviation	0.5	0.7	1.1			
Mode	1	1	1 & 3			
Minimum	1	1	1			
Maximum	6	4	4			
No. with One Victim Only	149	43	4	96.1	74.1	40.0
No. with Multiple Victims	6	15	6	3.9	25.9	60.0
Sex of Victims						
No. with Male Victims Only	102	25	3	65.8	43.1	30.0
No. with Female Victims Only	50	21	2	32.3	36.2	20.0
No. with Both Male and Female Victims	3	12	5	1.9	20.7	50.0
<i>Total</i>	<i>155</i>	<i>58</i>	<i>10</i>	<i>100.0</i>	<i>100.0</i>	<i>100.0</i>
Race Category of Victims						
No. with White Victims Only	87	47	9	56.1	81.0	90.0
No. with Non-White Victims Only	67	9	1	43.2	15.5	10.0
No. with Both White and Non-White Victims	1	2	0	0.6	3.4	0.0
<i>Total</i>	<i>155</i>	<i>58</i>	<i>10</i>	<i>100.0</i>	<i>100.0</i>	<i>100.0</i>
Age of Victims in Years						
Mean	35.2	30.8	28.1			
Standard Deviation	17.7	20.4	15.8			
Mode	21	19	30			
Minimum	0.5	0.4	2			
Maximum	89	78	66			
Notes: The standard deviation is a measure of how scores are dispersed around the mean. In a normal distribution, 68% of cases fall within one standard deviation of the mean in either direction. Thus, for example, if the mean age of victims is 35 and the standard deviation is 18, for 68% of all cases, the age of victims is between 17 and 53 years. The mode is the most frequently occurring victim age.						

Graph C presents the type of sentence received for murders committed since July 1, 1993 by various combinations of victim and offender race (White victims murdered by White offenders, etc.).



Notes: One White and one Non-White offender received life without parole and one Non-White offender received a determinate sentence for murders involving both White and Non-White victims (not shown). Error bars for determinate offenders indicate that the true population value may range by +/- 10%.

Several observations can be made from Graph C:

1. First, an overall comparison of the two sets of bars on the left (sets A and B) and the two sets of bars on the right (sets C and D) indicate that, regardless of offender race, perpetrators in White victim cases received more severe sentences than perpetrators in Non-White victim cases. For murders involving Non-White victims, significantly more offenders of either race received determinate sentences, fewer received life without parole, and virtually none received the death penalty. (It is important to note, however, that for White offenders who killed Non-White victims this finding is based on only four observations.)
2. White offenders who murdered White victims (set A) received *more severe* sentences than White offenders who murdered someone of another race (set C). (Again, it must be noted that only four White offenders had Non-White victims.) On the other hand, Non-

White offenders who murdered Non-White victims (set D) received *less severe* sentences than Nonwhite offenders who murdered White victims (set B).

3. It is interesting and important to note that the majority of all murders committed were intraracial. Ninety-seven percent (119/123) of White offenders murdered White victims and 75% (73/97) of Non-White offenders murdered Non-White victims. Thus, it is important to compare sentencing outcomes for White and Non-White offenders when they commit intraracial murder. Focusing only on the first and last sets of bars in Graph C (sets A and D), White offenders who killed White victims appear to get more severe sentences than Non-White offenders who killed Non-White victims. Moreover, comparing the bars in set B to those in set A, Non-White offenders who murdered White victims do not appear to be sentenced differently than White offenders who murdered White victims.

Collectively, these three observations from Graph C suggest that, if race plays a role in sentencing outcomes in Indiana, the race of the victim alone may play a more important role than the race of the offender or the interaction between victim and offender race.

Summary

Research on sentencing outcomes for murder was conducted to examine the issue of whether capital sentences in Indiana are imposed in a race-neutral manner. The focus of initial findings reported here is 224 individuals who received a determinate sentence, life without parole, or the death penalty for murders committed between July 1, 1993 (the effective date of Indiana's life without parole statute) and August 10, 2001 (the cut-off date for inclusion in the study). Approximately 70% received a determinate sentence, 26% received life without the possibility of parole, and 4% received the death penalty.

Initial findings indicate that:

- The majority of murders in Indiana since July 1, 1993 have been intraracial. Thus, in general, it appears that White offenders tend to murder White victims and Non-White offenders tend to murder Non-White victims;
- Ten murderers who committed their crimes on or after July 1, 1993 were sentenced to death;
- Since July 1, 1993, White offenders have received more severe sentences for murder than Non-White offenders; and
- Although sentencing outcomes for murders committed since July 1, 1993 appear to be less severe for Non-White offenders than for White offenders, this observation may have more to do with the victim's race than with the offender's race. When the victim is White, White offenders and Non-White offenders appear to be sentenced similarly, but when the victim is Non-White, Non-White offenders appear to be sentenced less severely than White offenders.

Additional analyses will help explain the observations reported here. The primary focus of future analyses on sentencing outcomes for murder in Indiana will be to help clarify whether people who commit murder are treated the same regardless of their race or the race of their victims. Cases that are similar in terms of the offender's culpability and the aggravating and mitigating circumstances that characterize the crime should equivalently result in one of the three graduated sentences imposed for murder in Indiana – a determinate or “fixed-term” sentence, life without the possibility of parole, or the death penalty. When legally relevant factors that can legitimately influence sentencing outcomes are controlled, legally irrelevant factors such as the race of the defendant and the race of the victim should not be disparately related to sentencing outcomes for murder or any other crime.

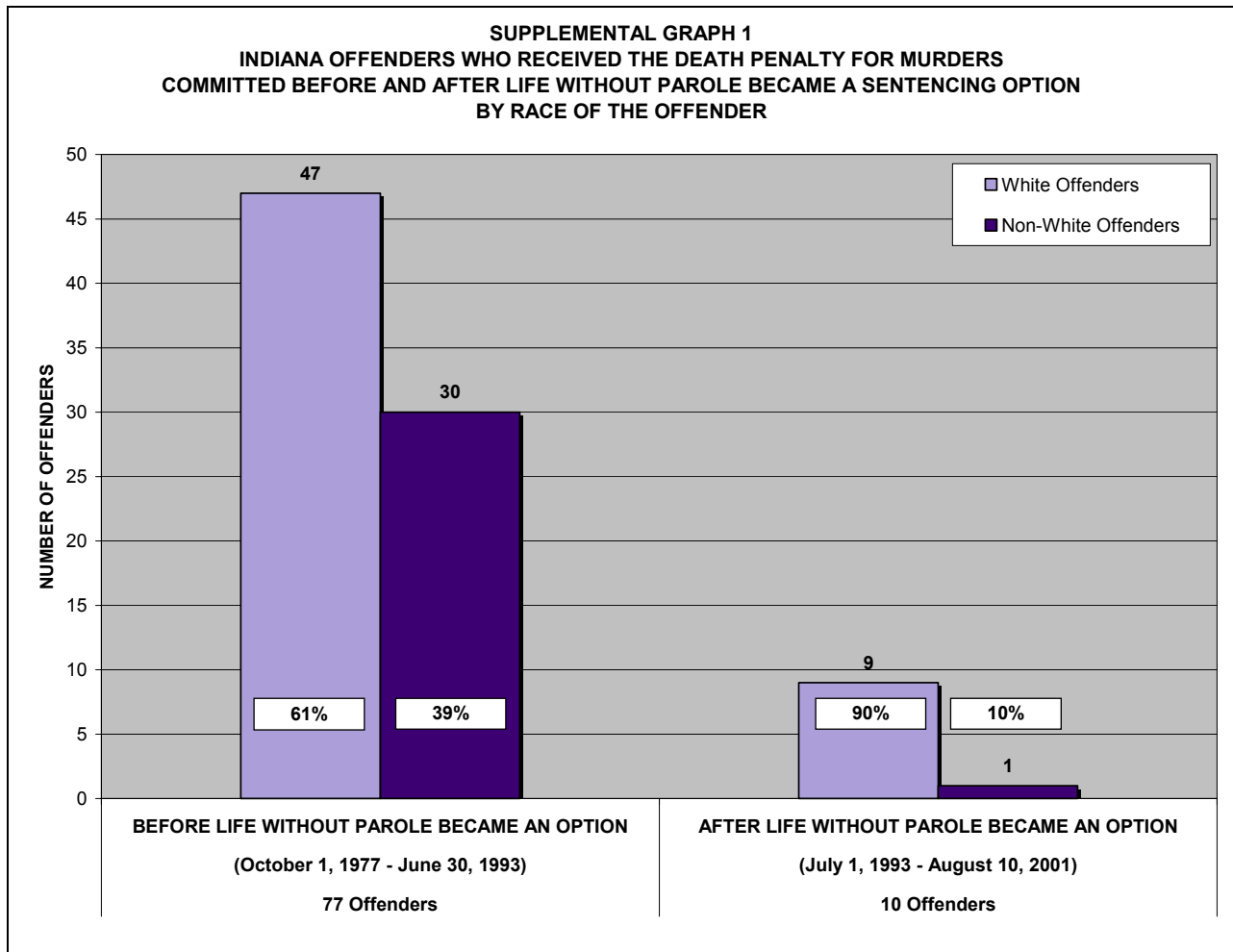
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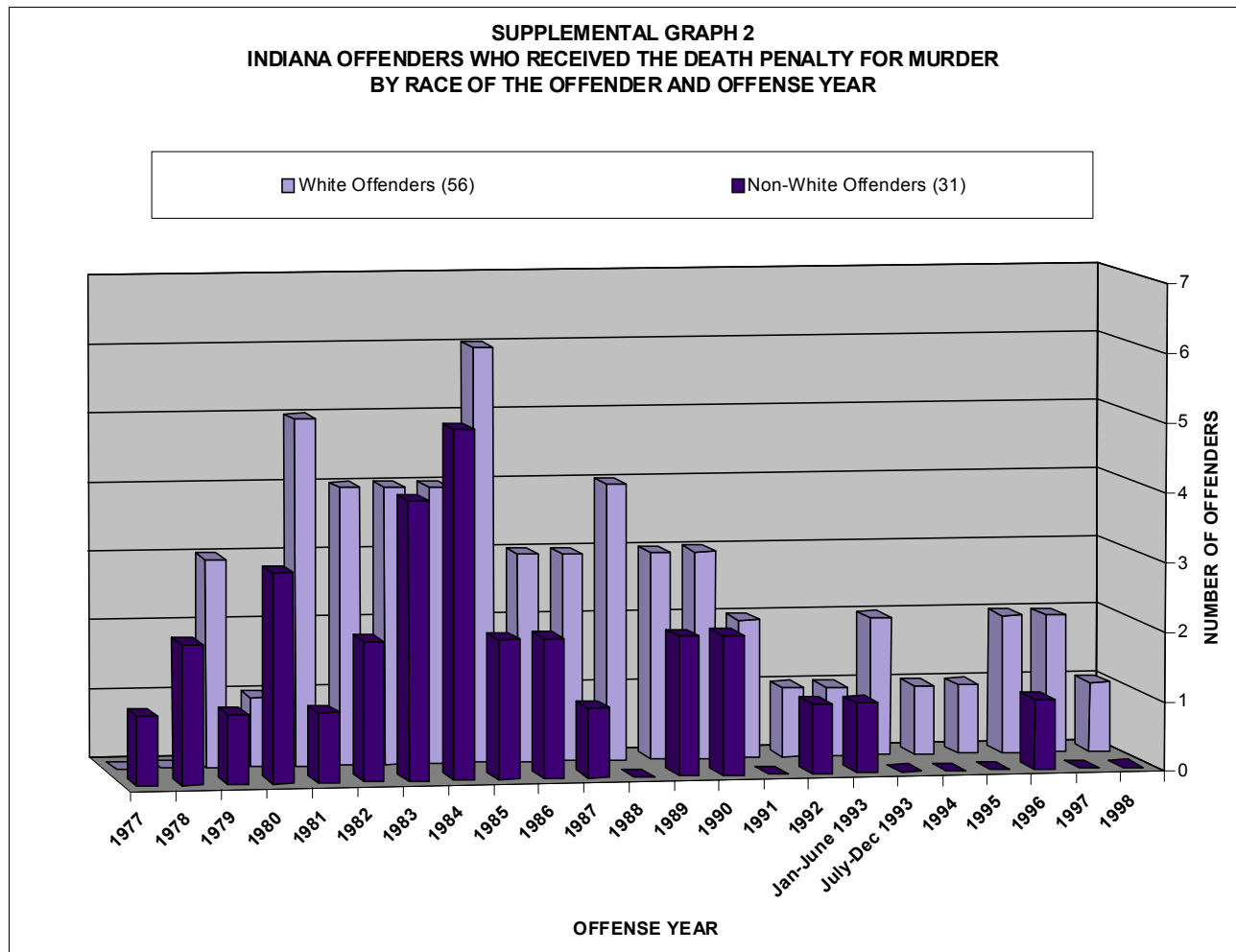
Appendix A

The supplemental graphs presented in Appendix A compare offender and victim race for the 10 death penalty offenders included in the initial findings report and the 77 offenders who received the death penalty for murders committed prior to the establishment of life without parole on July 1, 1993. Each graph is preceded by a brief description of the data shown. Summary comments are provided at the end of the appendix.

Supplemental Graph 1 compares the proportion of White and Non-White offenders (61% vs. 39%) who received the death penalty prior to the availability of life without parole to the proportion of White and Non-White offenders (90% vs. 10%) who received the death penalty after life without parole became a sentencing option. This comparison indicates that the 10 post-life without parole death penalty offenders included in the initial findings report are not similar in terms of offender race to the 77 pre-life without parole death penalty offenders. Consistent with initial findings on the racial breakdown of offenders who received the death penalty for murders committed after life without parole was established, however, more White than Non-White offenders received the death penalty in Indiana prior to the establishment of life without the possibility of parole.



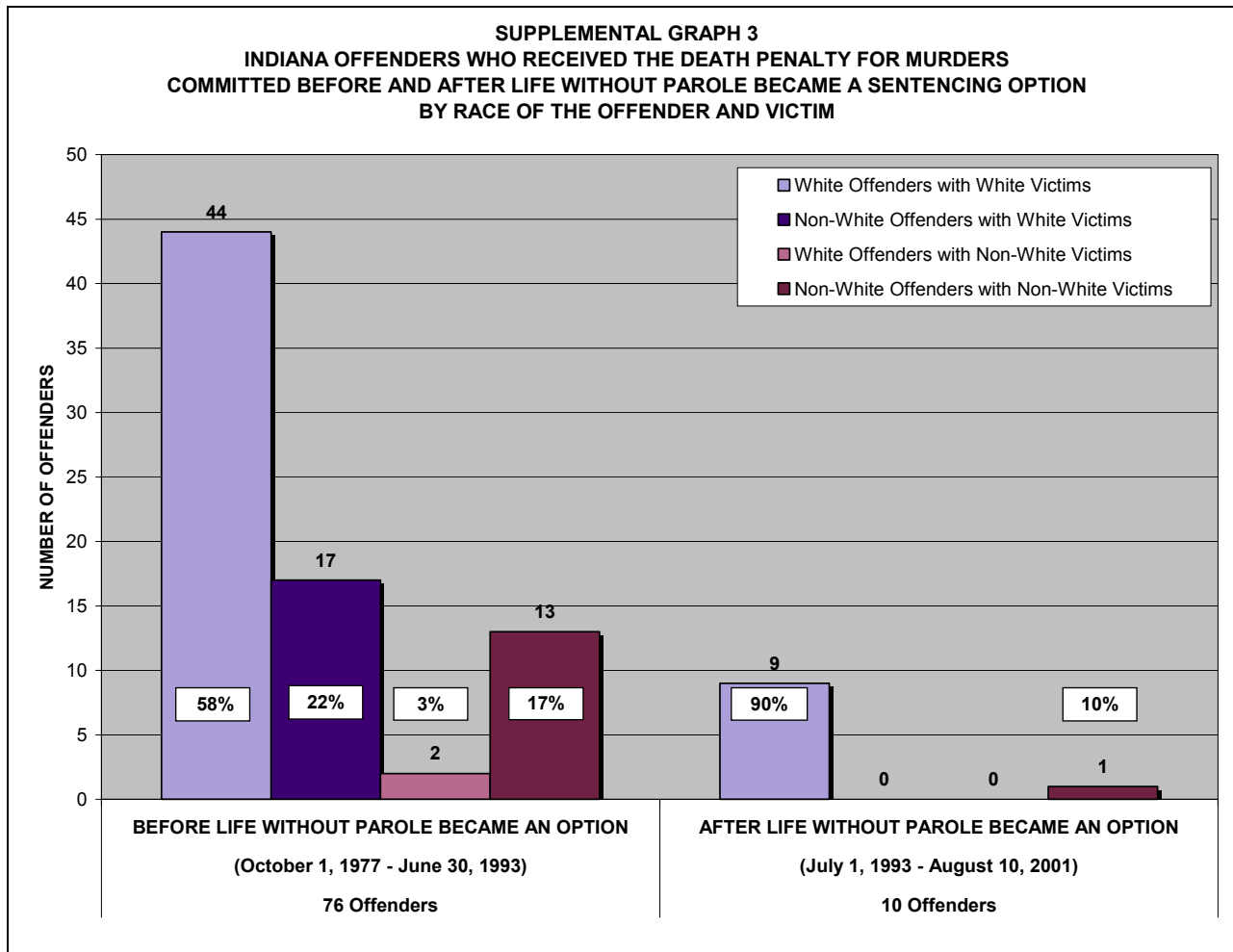
Supplemental Graph 2 compares the race of offenders who received the death penalty for murder by individual offense years both before and after the establishment of life without parole. This more detailed breakdown again shows that substantially fewer Non-White offenders (in this case only one) received the death penalty for murders committed after the establishment of life without parole on July 1, 1993 compared to the number of Non-White offenders who received the death penalty for murders committed prior to that time. Graph 2 also shows that the number of offenders receiving the death penalty has been steadily declining since 1984, regardless of offender race.



Supplemental Graph 3 compares offenders who received a death sentence for murders committed prior to the availability of life without parole to offenders who received a death sentence for murders committed after life without parole was instituted, by various combinations of victim and offender race. The following observations can be made based on Graph 3:

- Before life without parole became an option, about 6 in 10 death sentences represented White offenders who killed White victims – After life without parole became an option, 9 out of 10 death sentences represented White offenders who killed White victims (compare light blue bars).
- Before life without parole became an option, slightly more than 1 in 5 death sentences represented Non-White offenders who killed White victims – After life without parole became an option, this rate fell to zero (compare dark blue bars).

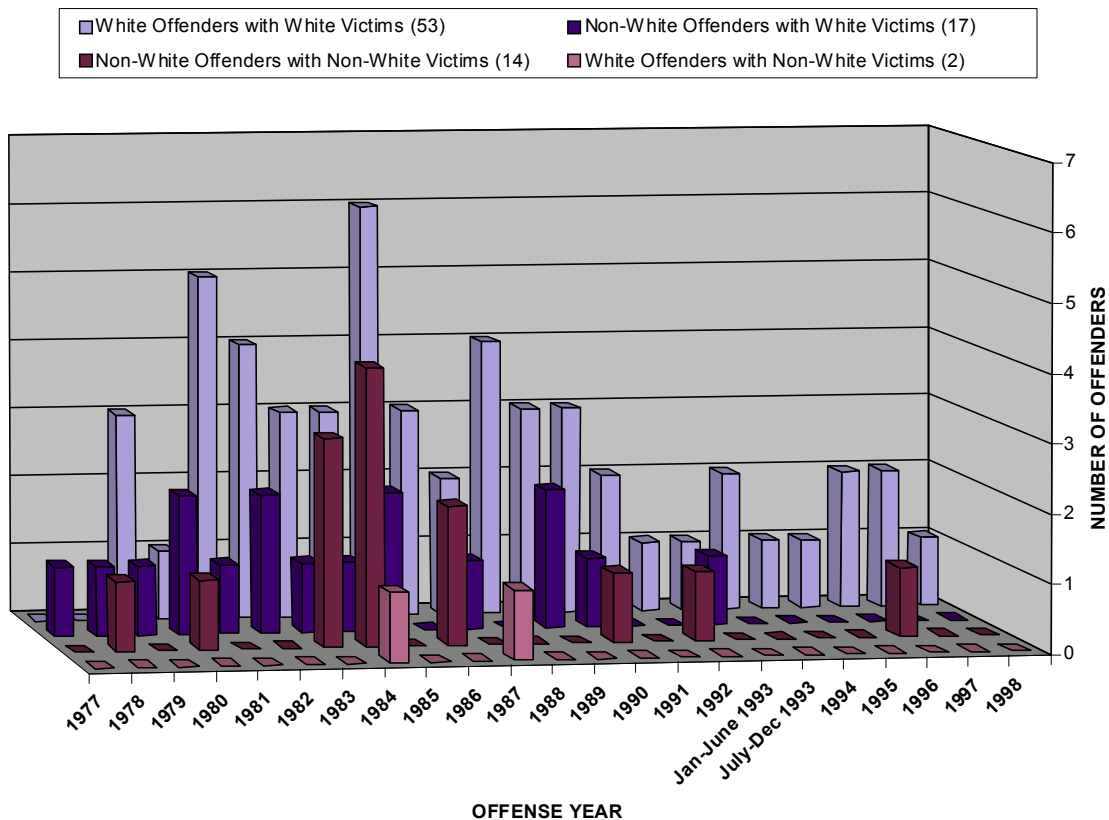
- Very few White offenders who killed Non-White victims received the death penalty in either time period (compare light red bars). (It is important to remember that, regardless of sentence type, only four of the White offenders in our study killed Non-White victims.)
- Before life without parole became an option, slightly less than 1 in 5 death sentences represented Non-White offenders who killed Non-White victims – After life without parole became an option, this rate fell to 1 in 10 (compare dark red bars).



Notes: One White offender was excluded from analyses for the group of offenders who committed their offenses before life without parole became an option because he killed both White and Non-White victims.

Supplemental Graph 4 breaks down death penalty offenders into the various combinations of offender and victim race for individual offense years both before and after the establishment of life without parole. In contrast to the period before the establishment of life without parole, with the exception of one Non-White offender who killed a Non-White victim, Graph 4 shows that only White offenders who killed White victims have received a death sentence for murders committed since life without parole became available on July 1, 1993. All other offender-victim race combinations steadily declined up until July 1, 1993 but then virtually disappeared after that time. Like Graph 2, Graph 4 shows that the number of offenders receiving a death sentence for murder has steadily declined since 1984, regardless of offender or victim race.

**SUPPLEMENTAL GRAPH 4
INDIANA OFFENDERS WHO RECEIVED THE DEATH PENALTY FOR MURDER
BY RACE OF THE OFFENDER & VICTIM AND OFFENSE YEAR**



Summary Comments

Supplemental Graph 1 illustrates that the racial composition of the 10 offenders sentenced to death for murders committed since life without parole became a sentencing option in Indiana on July 1, 1993 is different than the racial composition of offenders sentenced to death for murders committed prior to that time. Non-White offenders represent 39% of offenders who received a death sentence for murders committed before life without parole was established as a sentencing option and 10% of those so sentenced after life without parole was established. The reason for the observed difference in Indiana death sentences by race for murders committed prior to and after the establishment of life without parole is not known. It is noteworthy, however, that Indiana death sentences steadily have declined since 1984 regardless of offender race (see Graph 2). It is possible that the relative absence of Non-White offenders sentenced to death since July 1, 1993 simply reflects this continuing downward trend.

Appendix B

PRISONERS UNDER SENTENCE OF DEATH IN THE UNITED STATES ON DECEMBER 31, 2000								
Region and State	White	Black	Other	Total	% White	% Black	% Other	% Total
U.S. total	1990	1535	68	3593	55%	43%	2%	100%
Federal	5	13	0	18	28%	72%	0%	100%
State	1985	1522	68	3575	56%	43%	2%	100%
Northeast	94	161	11	266	35%	61%	4%	100%
Connecticut	4	3	0	7	57%	43%	0%	100%
New Hampshire	0	0	0	0				
New Jersey	8	7	0	15	53%	47%	0%	100%
New York	4	2	0	6	67%	33%	0%	100%
Pennsylvania	78	149	11	238	33%	63%	5%	100%
Midwest	251	251	2	504	50%	50%	0%	100%
Illinois	60	103	0	163	37%	63%	0%	100%
Indiana	30	13	0	43	70%	30%	0%	100%
Kansas	4	0	0	4	100%	0%	0%	100%
Missouri	46	33	0	79	58%	42%	0%	100%
Nebraska	10	0	1	11	91%	0%	9%	100%
Ohio	98	102	1	201	49%	51%	0%	100%
South Dakota	3	0	0	3	100%	0%	0%	100%
South	1059	840	25	1924	55%	44%	1%	100%
Alabama	97	87	1	185	52%	47%	1%	100%
Arkansas	16	24	0	40	40%	60%	0%	100%
Delaware	8	7	0	15	53%	47%	0%	100%
Florida	239	131	1	371	64%	35%	0%	100%
Georgia	64	55	1	120	53%	46%	1%	100%
Kentucky	33	7	0	40	83%	18%	0%	100%
Louisiana	30	59	1	90	33%	66%	1%	100%
Maryland	6	10	0	16	38%	63%	0%	100%
Mississippi	28	33	0	61	46%	54%	0%	100%
North Carolina	85	122	8	215	40%	57%	4%	100%
Oklahoma	81	42	6	129	63%	33%	5%	100%
South Carolina	35	31	0	66	53%	47%	0%	100%
Tennessee	59	36	2	97	61%	37%	2%	100%
Texas	260	185	5	450	58%	41%	1%	100%
Virginia	18	11	0	29	62%	38%	0%	100%
West	581	270	30	881	66%	31%	3%	100%
Arizona	103	12	4	119	87%	10%	3%	100%
California	349	215	22	586	60%	37%	4%	100%
Colorado	3	2	0	5	60%	40%	0%	100%
Idaho	21	0	0	21	100%	0%	0%	100%
Montana	5	0	1	6	83%	0%	17%	100%
Nevada	52	35	1	88	59%	40%	1%	100%
New Mexico	5	0	0	5	100%	0%	0%	100%
Oregon	24	0	1	25	96%	0%	4%	100%
Utah	8	2	1	11	73%	18%	9%	100%
Washington	9	4	0	13	69%	31%	0%	100%
Wyoming	2	0	0	2	100%	0%	0%	100%
Source: Snell, TL (December 2000). <i>Capital Punishment 2000</i> . U.S. Department of Justice, Bureau of Justice Statistics Bulletin (NCJ 190598).								

VI.

Whether Indiana should make any changes in its capital sentencing statute.

Background

The Eighth Amendment's Prohibition of Cruel and Unusual Punishments

In the Thirteenth Century, the Magna Carta,¹ the most famous document of English constitutional history, called for proportionality in criminal law, through the idea that the punishment should fit the crime, as expressed by the following in Chapter 14 of the document:

A Freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement; and a Merchant likewise, saving to him his Merchandise; and any other's villain than ours shall be likewise amerced, saving his wainage, if he falls into our mercy.²

The same idea was enunciated over four centuries later in the English Bill of Rights of 1689, when its writers declared that

excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted....³

Over five centuries after the issuance of the Magna Carta, the drafters of a constitution for the young republic of the United States assembled. Relying on the legal system they knew, English common law as evolved from the Magna Carta, they wrote

¹ Issued in 1215 by King John at Runnymede under compulsion from the barons and the Church.

² *Magna Carta*, "A translation of Magna Carta as confirmed by Edward I with his seal in 1297," National Archives and Records Administration, found at <http://wae.com/freedom/magtrans.html> (last visited 8/15/01).

³ *English Bill of Rights, An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown*, The Avalon Project at the Yale Law School, found at <http://www.yale.edu/lawweb/avalon/england.htm> (last visited 8/15/01).

our Constitution, including the Eighth Amendment, which had the following familiar ring:

[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.⁴

The same drafters recognized the punishment of death as appropriate under certain circumstances. The Fifth Amendment provides that no one shall be "deprived of life" without due process of law, and that no person shall "be twice put in jeopardy of life" for the same offense or be compelled "to answer for a capital, or otherwise infamous crime." Later, the Fourteenth Amendment provided that no State shall "deprive any person of life" without due process of law.

The individual United States colonies made use of those constitutional provisions, prescribing a capital sentence for the offenses of murder, rape, burglary, sodomy, arson, treason, adultery, witchcraft, blasphemy, sexual immorality, horse stealing, counterfeiting, forgery, and in some southern states, stealing slaves, concealing slaves with the intent to emancipate them, and inciting slaves to insurrection.⁵ Methods of administering non-capital sentences in the colonies stemmed from English origins and included the pillory, the stocks, whipping, splitting the nostrils, branding, and cutting off the hand or ear.⁶

For example, the North Carolina legislature passed a law in 1786 requiring horse thieves, for a first offense, to "stand in the pillory one hour, and [be] publicly whipped on his, or her or their bare backs with thirty-nine lashes well laid on, and at the same time [to] have his, her, or their ears nailed to the pillory and cut off, and [to] be branded on the right cheek with the letter H of the length of three-quarters of an inch, and on the left cheek with the letter T of the same dimensions as the letter H, in a plain and visible manner."

⁴ U.S. Const. amend. VIII.

⁵ See Raymond Paternoster, *Capital Punishment in America*, p. 5 (1991) (quoting William J. Bowers, *Legal Homicide*, (1984), and Hugo Bedau, *The Death Penalty in America*, (3rd Ed. 1982).

⁶ Jan Gorecki, *Capital Punishment: Criminal Law and Social Evolution*, 862-63 (1983) (quoting 4 William Blackstone, *Commentaries* 18, pp. 369-72 (1768)).

The death penalty was to be imposed for a second offense. [] Pennsylvania enacted a law providing that an individual filing for bankruptcy who committed perjury at the time assets were examined, which "tend[ed] to the damage of the creditors twenty pounds," shall be required to "stand in the pillory in some public place two hours and have one of his ears nailed to the pillory and cut off." [] In Virginia, a statute in effect in the 1780s, and reenacted in 1792, punished, for a first offense, the stealing of hogs, by inflicting, "twenty-five lashes, well laid on, at the public whipping post of the county;" for a second offense, one was required to "stand two hours in the pillory, on a court day, at the court house of the county, ... and have both ears nailed thereto, and, at the end of two hours, have the ears cut loose from the nails." A third offense was punishable by death.[]⁷

Capital sentencing was first prescribed under federal law when in 1790 the nation's First Congress enacted legislation prescribing death for murder, robbery, rape, and forgery of public securities.⁸

With our society's evolvement over time came a gradual narrowing of the circumstances under which a capital sentence would be imposed and of acceptable methods of administering the sentence. In the early 1800s many northern and eastern states reduced the number of crimes qualifying for a capital sentence and improved capital proceedings to narrow the discretion of judges and jurors.⁹ As territories gained statehood, most adopted capital sentencing.

⁷ Alan I. Bigel, *Justices William J. Brennan, Jr., and Thurgood Marshall On Capital Punishment: Its Constitutionality, Morality, Deterrent Effect, and Interpretation by the Court*, Symposium on Capital Punishment, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, p.30, n. 130 (1994) (citations omitted).

⁸ Raymond Paternoster, *Capital Punishment in America*, p. 5 (1991).

⁹ See Raymond Paternoster, *Capital Punishment in America*, pp. 6-9 (1991); Louis P. Masur, *Rites of Execution, Capital Punishment and the Transformation of the American Culture, 1776-1865*, 50-92 (1989); and Jan Gorecki, *Capital Punishment: Criminal Law and Social Evolution* 83-87 (1983).

In 1855, an Indiana capital appellant challenged his sentence, alleging that a death sentence is vindictive and violates the principles of reformation, and as such is in violation of Indiana Constitution Article 1, § 18, which provides as follows:

Reformation as basis of penal code.--The penal code shall be founded on the principles of reformation, and not of vindictive justice.

The Indiana Supreme Court responded, "The punishment of death for murder in the first degree, is not, in our opinion, vindictive, but is even-handed justice."¹⁰

In 1890 the United States Supreme Court characterized the execution methods of burning at the stake, crucifixion, and breaking on the wheel "inhuman and barbarous," noting that "[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution."¹¹

In a 1910 non-capital case, the United States Supreme Court for the first time declared that punishments disproportionate to the offense committed violated the Eighth Amendment's proscription against cruel and unusual punishment.¹² The offender, convicted of falsifying an official government document, received the following sentence: (1) 15 years' imprisonment during which time he had to wear a chain hanging from his ankle and wrist; (2) a heavy fine; (3) loss of voting rights; and (4) lifetime surveillance. The Court, explaining the difference between its Eighth Amendment interpretation and that of the founders, noted that "time works changes, brings into existence new

¹⁰ *Driskill v. State*, 7 Ind. 338, 343 (1855).

¹¹ *In re Kemmler*, 136 U.S. 436, 447 (1890).

¹² *See Weems v. United States*, 217 U.S. 349 (1910).

conditions and purposes,” and compelled “progressive” application of provisions that may “acquire meaning as public opinion becomes enlightened by a humane justice.”¹³

In 1958 the Court stated that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹⁴

In 1966 and again in 1970 the Court reviewed the fairness of capital procedural standards, examining the issue of coerced confessions¹⁵ and a defendant’s right to question the testimony of prosecution witnesses.¹⁶

In 1971, in two cases handed down on the same day, the Supreme Court addressed the discretion of capital juries and whether both judgment and sentence may be imposed in a single proceeding. The Court found that state statutes leaving absolute discretion to juries to impose the death penalty, without any guiding standards, did not violate due process protections.¹⁷

The next year in the landmark case of *Furman v. Georgia* the Court changed its mind and ordered states to reexamine their capital trial and sentencing proceedings. The Court found that the Georgia and Texas statutes enabled arbitrary imposition of capital punishment and that “the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and

¹³ Alan I. Bigel, *Justices William J. Brennan, Jr., and Thurgood Marshall On Capital Punishment: Its Constitutionality, Morality, Deterrent Effect, and Interpretation by the Court*, Symposium on Capital Punishment, 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 11, p.30, n. 130 (1994) (quoting *Weems*, 217 U.S. at 373, 378).

¹⁴ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

¹⁵ See *Davis v. North Carolina*, 384 U.S. 737 (1966); *Brady v. United States*, 397 U.S. 742 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970); and *North Carolina v. Alford*, 400 U.S. 25 (1970).

¹⁶ *Dutton v. Evans*, 400 U.S. 74 (1970).

¹⁷ See *McGautha v. California* and *Crampton v. Ohio*, 402 U.S. 183, 221 (1971), *reh’g denied*, 406 U.S. 978 (1972).

Fourteenth amendments."¹⁸ Then came over 200 pages of nine separate opinions wherein the justices discussed capital punishment's constitutionality, infrequency of imposition, arbitrariness, racial bias, deterrent effect, acceptance by contemporary society, and the judiciary's role in overseeing criminal justice in the states. Despite all the discussion in this lengthy opinion, the *Furman* Court failed to advise states how to revise their laws and what to do with six hundred forty-two inmates then on death row who at least temporarily had been granted a stay of execution.¹⁹

Indiana's Capital Sentencing Statute

After *Furman*, the sentences of Indiana's seven capital inmates were amended to life in prison.²⁰ And Indiana, in 1973, and the thirty-four other capital punishment states enacted revised capital statutes that narrowed juror discretion. Twenty-five states called for a bifurcated process for guilt and sentencing phases and required juries and judges to consider specific aggravating and mitigating circumstances. Ten states eliminated the possibility of arbitrariness by mandating a capital sentence for specific offenses.²¹

The death penalty is prohibited from being mandatory or left to the unlimited discretion of the jury and judge.

In 1976, in five cases handed down the same day, the United States Supreme Court discussed the new capital statutes of North Carolina, Georgia, Texas, Florida, and

¹⁸ 408 U.S. 238, 239-40 (1972), *reh'g denied*, 409 U.S. 902 (1972) (decided together with *Jackson v. Georgia* and *Branch v. Texas*, the *Furman* jury recommended death for attempted burglary and murder, and both the *Jackson* and *Branch* juries recommended death for rape).

¹⁹ Alan I. Bigel, *Justices William J. Brennan, Jr., and Thurgood Marshall On Capital Punishment: Its Constitutionality, Morality, Deterrent Effect, and Interpretation by the Court*, Symposium on Capital Punishment, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, p.65-66 (1994).

²⁰ Public Defender Council, "Death Penalty Facts," May 5, 2001, also available at <http://www.state.in.us/pdc/dpfacts.htm>.

²¹ Jan Gorecki, *Capital Punishment: Criminal Law and Social Evolution*, p. 16-18 (1983).

Louisiana. The Court struck down the North Carolina and Louisiana statutes²² and upheld the Georgia, Texas, and Florida statutes. The upheld statutes required bifurcated guilt and sentencing phases, required a finding of at least one aggravator from a list of statutorily enumerated aggravating and mitigating factors before death could be imposed, and allowed a sentence other than death even after a finding of guilty beyond a reasonable doubt. In these cases, the Court found that limiting the category of capital offenses and requiring the weighing of aggravating and mitigating factors served to confine sentencing discretion and reduced arbitrariness.²³

Indiana's statute was similar to the stricken North Carolina statute, which had been challenged in the case of *Woodson v. North Carolina*.²⁴ The North Carolina statute mandated a capital sentence after a finding of guilt and provided as follows:

Murder in the first and second degree defined; punishment -- A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison.²⁵

The Court found this statute "unduly harsh and unworkably rigid."²⁶ The Court noted that mandatory capital statutes could produce arbitrary sentencing, if jurors found

²² *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325, *reh'g denied*, 429 U.S. 890 (1976).

²³ *Gregg v. Georgia*, 428 U.S. 153, *reh'g denied*, 429 U.S. 875 (1976); *Jurek v. Texas*, 428 U.S. 262, *reh'g denied sub nom. Gregg v. Georgia*, 429 U.S. 875 (1976); and *Proffitt v. Florida*, 428 U.S. 242, *reh'g denied sub nom. Gregg v. Georgia*, 429 U.S. 875 (1976).

²⁴ *Woodson v. North Carolina*, 428 U.S. 280 (1976).

²⁵ N.C.Gen.Stat. § 14--17 (Cum.Supp.1975).

²⁶ *Woodson*, 428 U.S. at 286 and 293.

guilt for a lesser offense because they felt that a particular defendant did not deserve death. The Court also noted that mandatory statutes precluded jurors from exercising their discretion to fully consider the defendant's particular circumstances.

The Court found the statute to be constitutionally deficient on three grounds. First, it provided for a mandatory, automatic death penalty, which departed "markedly from contemporary standards respecting the imposition of the punishment of death and thus cannot be applied consistently with the Eighth and Fourteenth Amendments' requirement that the state's power to punish 'be exercised within the limits of civilized standards.'"²⁷ Second, the statute failed to provide the jury and judge with "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death," contrary to *Furman*.²⁸ Third, it failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death," contrary to "the fundamental respect for humanity underlying the Eighth Amendment."²⁹

Indiana's then-new statute, similar to North Carolina's, had provided that

(a) Whoever kills a human being either purposely and with premeditated malice or while perpetrating or attempting to perpetrate rape, arson, robbery, or burglary is guilty of murder in the first degree and, on conviction, shall be imprisoned in the state prison during life, *unless the killing is one for which subsection (b) prescribes the death penalty.*

(b) Whoever perpetrates any of the following acts is guilty of murder in the first degree and, on conviction, *shall be put to death:*

²⁷ *Woodson*, 428 U.S. at 301 (citation omitted).

²⁸ *Woodson*, 428 U.S. at 303.

²⁹ *Woodson*, 428 U.S. at 304.

(1) Killing purposely and with premeditated malice a police officer, corrections employee, or fireman acting in the line of duty.

(2) Killing a human being by the unlawful and malicious detonation of an explosive.

(3) Killing a human being while perpetrating or attempting to perpetrate rape, arson, robbery, or burglary by a person who has had a prior unrelated conviction of rape, arson, robbery, or burglary.

(4) Killing a human being while perpetrating or attempting to perpetrate a kidnapping.

(5) Killing a human being while perpetrating or attempting to perpetrate any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft, train, bus, ship, or other commercial vehicle.

(6) Killing a human being purposely and with premeditated malice:

- (i) by a person lying in wait;
- (ii) by a person hired to kill;
- (iii) by a person who has previously been convicted of murder; or
- (iv) by a person who is serving a life sentence.

An indictment under subsection (b) may not charge a lesser included offense, but in all situations to which this subsection applies, the jury, or the trial judge if there be no jury, may find the defendant guilty of second degree murder or voluntary or involuntary manslaughter, if the facts proved are insufficient to convict the defendant of the offense charged.³⁰

In the spring of 1977, the year following the United States Supreme Court's *Woodson* decision, the Indiana Supreme Court struck down Indiana's 1973 death penalty statute. In *French v. State*, our Court held that in light of *Woodson* and other cases, Indiana's statute violated the constitutional ban against cruel and unusual

³⁰ IC 35--13--4--1 (1975).

punishment. The violation arose through the statute's mandate of an automatic capital sentence, its failure to provide objective standards to guide, regularize, and make rationally reviewable the sentencing process, and its failure to allow individualized consideration of relevant aspects of the defendant's character and history before sentencing.³¹

The capital sentences of the eight inmates on Indiana's death row were set aside.³²

In October of 1977, the Indiana General Assembly enacted a new capital sentencing statute modeled on those upheld by the United States Supreme Court. With various amendments over the years, some say too many,³³ the statute remains in effect today and provides in full as follows:

IC 35-50-2-9 Death sentence; life imprisonment without parole³⁴

(a) The state may seek either a death sentence or a sentence of life imprisonment without parole for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged. However, the state may not proceed against a defendant under this section if a court determines at a pretrial hearing under IC 35-36-9 that the defendant is a mentally retarded individual.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit any of the following:

³¹ See *French v. State*, 266 Ind. 276, 362 N.E.2d 834 (1977).

³² Public Defender Council, "Death Penalty Facts," May 5, 2001, also available at <http://www.state.in.us/pdc/dpfacts.htm>.

³³ Since October 1977, the statute has been amended by P.L.336-1983, SEC.1; P.L.212-1986, SEC.1; P.L.332-1987, SEC.2; P.L.320-1987, SEC.2; P.L.296-1989, SEC.2; P.L.138-1989, SEC.6; P.L.1-1990, SEC.354; P.L.230-1993, SEC.5; P.L.250-1993, SEC.2; P.L.158-1994, SEC.7; P.L.306-1995, SEC.1; P.L.228-1996, SEC.1; P.L.216-1996, SEC.25; P.L.261-1997, SEC.7.

³⁴ Acts 1977, P.L.340, SEC.122.

- (A) Arson (IC 35-43-1-1).
- (B) Burglary (IC 35-43-2-1).
- (C) Child molesting (IC 35-42-4-3).
- (D) Criminal deviate conduct (IC 35-42-4-2).
- (E) Kidnapping (IC 35-42-3-2).
- (F) Rape (IC 35-42-4-1).
- (G) Robbery (IC 35-42-5-1).
- (H) Carjacking (IC 35-42-5-2).
- (I) Criminal gang activity (IC 35-45-9-3).
- (J) Dealing in cocaine or a narcotic drug (IC 35-48-4-1).

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, probation officer, parole officer, community corrections worker, home detention officer, fireman, judge, or law enforcement officer, and either:

- (A) the victim was acting in the course of duty; or
- (B) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder.

(9) The defendant was:

- (A) under the custody of the department of correction;
- (B) under the custody of a county sheriff;
- (C) on probation after receiving a sentence for the commission of a felony; or
- (D) on parole;

at the time the murder was committed.

(10) The defendant dismembered the victim.

(11) The defendant burned, mutilated, or tortured the victim while the victim was alive.

(12) The victim of the murder was less than twelve (12) years of age.

(13) The victim was a victim of any of the following offenses for which the defendant was convicted:

- (A) Battery as a Class D felony or as a Class C felony under IC 35-42-2-1.
- (B) Kidnapping (IC 35-42-3-2).
- (C) Criminal confinement (IC 35-42-3-3).
- (D) A sex crime under IC 35-42-4.

(14) The victim of the murder was listed by the state or known by the defendant to be a witness against the defendant and the defendant committed the murder with the intent to prevent the person from testifying.

(15) The defendant committed the murder by intentionally discharging a firearm (as defined in IC 35-47-1-5):

- (A) into an inhabited dwelling; or
- (B) from a vehicle.

(16) The victim of the murder was pregnant and the murder resulted in the intentional killing of a fetus that has attained viability (as defined in IC 16-18-2-365).

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when the murder was committed.

(3) The victim was a participant in or consented to the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) The defendant was less than eighteen (18) years of age at the time the murder was committed.

(8) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury or the court may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The court shall instruct the jury concerning the statutory penalties for murder and any other offenses for which the defendant was convicted, the potential for consecutive or concurrent sentencing, and the availability of good time credit and clemency. The defendant may present any additional evidence relevant to:

(1) the aggravating circumstances alleged; or

(2) any of the mitigating circumstances listed in subsection (c).

(e) Except as provided by IC 35-36-9, if the hearing is by jury, the jury shall recommend to the court whether the death penalty or life imprisonment without parole, or neither, should be imposed. The jury may recommend:

(1) the death penalty; or

(2) life imprisonment without parole;

only if it makes the findings described in subsection (k). The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation. In making the final determination of the sentence after receiving the jury's recommendation, the court may receive evidence of the crime's impact on members of the victim's family.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, except as provided by IC 35-36-9, the court shall:

(1) sentence the defendant to death; or

(2) impose a term of life imprisonment without parole;

only if it makes the findings described in subsection (k).

(h) If a court sentences a defendant to death, the court shall order the defendant's execution to be carried out not later than one (1) year and one (1) day after the date the defendant was convicted. The supreme court has exclusive jurisdiction to stay the execution of a death sentence. If the supreme court stays the execution of a death sentence, the supreme court shall order a new date for the defendant's execution.

(i) If a person sentenced to death by a court files a petition for post-conviction relief, the court, not later than ninety (90) days after the date the petition is filed, shall set a date to hold a hearing to consider the petition. If a court does not, within the ninety (90) day period, set the date to hold the hearing to consider the petition, the court's failure to set the hearing date is not a basis for additional post-conviction relief. The attorney general shall answer the petition for post-conviction relief on behalf of the state. At the request of the attorney general, a prosecuting attorney shall assist the attorney general. The court shall enter written findings of fact and conclusions of law concerning the petition not later than ninety (90) days after the date the hearing concludes. However, if the court determines that the petition is without merit, the court may dismiss the petition within ninety (90) days without conducting a hearing under this subsection.

(j) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The supreme court's review must take into consideration all claims that the:

(1) conviction or sentence was in violation of the:

(A) Constitution of the State of Indiana; or

(B) Constitution of the United States;

(2) sentencing court was without jurisdiction to impose a sentence; and

(3) sentence:

(A) exceeds the maximum sentence authorized by law; or

(B) is otherwise erroneous.

If the supreme court cannot complete its review by the date set by the sentencing court for the defendant's execution under subsection (h), the supreme court shall

stay the execution of the death sentence and set a new date to carry out the defendant's execution.

(k) Before a sentence may be imposed under this section, the jury, in a proceeding under subsection (e), or the court, in a proceeding under subsection (g), must find that:

(1) the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances listed in subsection (b) exists; and

(2) any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

Thus, only the crime of murder plus at least one of the 16 delineated aggravating factors qualifies for a capital sentence. After conviction, a separate hearing is held to determine the penalty. There, the jury and judge hears evidence of aggravating and mitigating circumstances, and the jury recommends a sentence. The judge may go with the jury's recommendation or override that recommendation with a sentence that the judge deems more appropriate, although in any case, a death sentence requires a finding of at least one statutory aggravator and that the aggravator(s) outweigh the mitigators.

Vague death penalty statutes invite arbitrariness. Vagueness arises in statutes that fail to adequately define who is subject to being charged with a capital offense, what crimes are subject to being charged as capital crimes, what circumstances are considered aggravating or mitigating, what burdens must be met, or which party has the burden.

Indiana's death penalty statute contains none of the typical unconstitutionally vague terms that courts have consistently found to violate a defendant's due process rights. The statute well defines specific aggravating factors, details numerous mitigating circumstances, including the general "catch all" of "any other circumstances appropriate for consideration," and clearly gives the State the burden of proving beyond a

reasonable doubt that at least one aggravating circumstance exists. The statute explains that death is not mandatory, and that even if the statutory pre-requisites have been met to recommend the death penalty, the jury need not but rather "may" recommend the death penalty. Indiana's statute has fared well on federal review; the United States Supreme Court has generally held that the statute embraces guided discretion in using aggravating factors to narrow what type of crime or person is eligible for death as a penalty, and that it adequately allows liberal evidence of mitigating circumstances.

Conclusion

The Commission raises four areas of concern regarding potential statutory change: (1) number of aggravators; (2) jury override; (3) minimum age; and (4) *mens rea*.³⁵ While each area is a matter of public policy for the General Assembly to review, the Commission recommends two specific changes.

First, the Commission recommends to the General Assembly that Indiana Code 35-50-2-3 be amended to require that the defendant personally killed, intended to kill, or intended that a killing occur.

Second, the Commission recommends to the General Assembly that it eliminate judicial override of jury recommendations either for or against the death penalty, and that

³⁵ *Mens rea* is "legalese" from Latin meaning "guilty mind." "The state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime; criminal intent or recklessness." Black's Law Dictionary, Seventh Edition, West Group, St. Paul, Minn., p. 1312, 1999. "Most English lawyers would however now agree with Sir James Fitzjames Stephen that the expression *mens rea* is unfortunate, though too firmly established to be expelled, just because it misleadingly suggests that, in general, moral culpability is essential to a crime, and they would assent to the criticism expressed by a later judge that the true translation of *mens rea* is 'an intention to do the act which is made penal by statute or by the common law.'" H.L.A. Hart, "Legal Responsibility and Excuses" in *Punishment and Responsibility*, 28, 36 (1968) (quoting *Allard v. Selfridge*, 1 KB at 37 (1925).

jury be provided with the same information the judge is provided with, with the understanding that the nature of the information that the jury receives would have to be further explored.

The issues of reducing statutory aggravator voluminosity and increasing the minimum age for capital sentence eligibility were discussed, with no consensus reached.

Summary of Recommendations from Recent Death Penalty Studies

Arizona Attorney General's Capital Case Commission (AZ): Arizona Attorney General Janet Napolitano formed this commission in the summer of 2000 to study key issues of the death penalty process and make recommendations to ensure that the system is fair to defendants and victims. The commission, which is chaired by Napolitano, includes prosecutors, defense attorneys, trial and appellate judges, victim's rights advocates, citizens, and members of the Arizona legislature.

Illinois Supreme Court Special Committee on Capital Punishment (ILCT): Created by the Supreme Court of Illinois in April 1999, and made up of 16 trial judges and one appellate court judge, this group assessed the state's death penalty system and recommended a number of systemic improvements. Governor George Ryan also appointed a commission to consider improvements to the state's capital punishment system. The governor's commission has not yet issued a report.

Illinois Death Penalty Education Project (IDPEP): Created in 2000, this nonpartisan project promotes research and informed dialogue concerning Illinois' capital punishment system and possible alternatives. The project is presided over by retired Cook County Circuit Court Judge Sheila M. Murphy, and its advisory board includes members of the legal, educational, professional, religious, and law enforcement communities. The project endorses the Supreme Court's proposed reforms and the legislature's creation of a capital litigation fund, and has proposed twelve additional reforms designed to create a more fair and equitable death penalty system.

Constitution Project Death Penalty Initiative (CPDPI): Created in May 2000, the Death Penalty Initiative is sponsored by the Constitution Project, a nonprofit organization which seeks to develop bipartisan solutions to contemporary social policy issues by combining scholarship and public education. The project and its initiatives are housed at the Georgetown University Law Center in Washington, DC. The Death Penalty Initiative is co-chaired by retired appellate judges from Texas and Florida and a federal prosecutor from the Oklahoma City bombing trials, and its members include capital defense attorney David Bruck and former FBI director William Sessions, as well as other attorneys and judges and business, religious, and community leaders. In July 2001, the Initiative issued a report proposing eighteen reforms to the nation's death penalty process.

American Bar Association Moratorium Resolution (ABAR): In February 1997, the ABA House of Delegates passed a resolution calling for a moratorium on executions in the United States until a number of reform measures were adopted.

ABA Section of Individual Rights and Responsibilities, Guide for Examining the Administration of the Death Penalty in the United States (ABAG): In June 2001, the ABA Section of Individual Rights and Responsibilities published a guide to help states "conduct comprehensive reviews of the laws, processes, and procedures relevant to the administration of capital punishment in their

jurisdiction.” The guide also includes recommendations for addressing a number of common problems.

Recommendation	AZ	ILCT	IDPEP	CPDPI	ABAR	ABAG
Effective Counsel						
Create a capital defense bar with minimum standards of training and experience, either through creation of a statewide office, creation of a central independent appointing authorities, or adoption of minimum standards for appointment.	X	X		X	X	X
Provide adequate compensation for counsel and funding for additional resources such as mitigation investigators.	X			X		X
Adopt minimum standards of competence for defense counsel beyond mere training and experience requirements. (I.e., AZ would require capital defenders to “have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases,” and ILCT would require “substantial familiarity with expert witnesses, forensic and medical evidence, mental health, pathology, and DNA profiling.”)	X	X		X	X	X
Ensure provision of funds for experts, investigators, and mitigation specialists.	X			X		X
Provide funding for adequate representation of “partially indigent” defendants, to ensure they have two qualified attorneys and other resources as necessary.		X				
Vacate existing death sentences where counsel did not meet proposed standards of competence			X			
Replace <i>Strickland</i> standard for effective assistance of counsel with a more demanding standard in capital sentencing context.				X		

Recommendation	AZ	ILCT	IDPEP	CPDPI	ABAR	ABAG
Schedule proceedings at each stage of capital case to allow adequate time for investigation, fact development, and decision making.						X
Protecting the Innocent						
Require audio and video recording of police interviews of suspects, when feasible	X	X	X			
Adopt cautionary jury instruction regarding informant testimony.		X				
Establish LWOP as maximum penalty in cases where conviction depends on single eyewitness.			X			
Permit expert testimony concerning eyewitness fallibility in capital trials.			X			
Establish eyewitness identification protocol			X			
Exclude confessions that are not recorded			X			
Establish LWOP as maximum penalty in cases where testimony against defendant is given in exchange for special treatment.			X			
Establish LWOP as maximum penalty if previous guilt-phase jury could not reach verdict or if any juror expresses residual doubt about defendant's guilt.			X			
Establish independent state forensic laboratory which conducts blind testing of all evidence submitted by either prosecution or defense.			X			
Require that DNA be preserved, tested, and introduced in cases				X		

Recommendation	AZ	ILCT	IDPEP	CPDPI	ABAR	ABAG
where it may help establish that an execution would be unjust.						
Relax procedural bars to introduction of newly discovered evidence.				X		
Train police and adopt guidelines to help ensure that interrogations of mentally retarded and mentally ill suspects do not result in coerced and/or questionable confessions.						X
Restricting Application to Appropriate Crimes and Defendants						
Exempt mentally retarded from application of death penalty	X			X	X	X
Exempt defendants under 18 from application of death penalty	X			X	X	X
Expand aggravating factor where victim is peace officer to include off-duty officer, so long as murder was motivated by officer's status.	X					
Exempt defendants convicted of felony murder, but who did not kill, intend to kill, or intend that a killing take place, from application of death penalty.				X		
Clearly instruct juries that mental illness is a mitigating rather than aggravating factor.						X
Role of the Prosecutor						
Extend time for filing of notice of intent to seek death penalty	X					
Require written policy regarding decision to seek death penalty, including provision to solicit or accept defense input.	X					
Require pretrial notice of intent to seek death penalty within		X				

Recommendation	AZ	ILCT	IDPEP	CPDPI	ABAR	ABAG
120 days						
Establish disclosure/discovery requirements		X		X		
Adopt minimum standards of competence for assistant prosecutors in capital cases.		X				
Amend Rules of Professional Conduct to require that prosecutors, in all criminal cases, must seek justice and not merely convictions.		X				
Require prosecutors to provide "open-file discovery" to defense, including all materials gathered by law enforcement and investigative agencies.				X		
Require that prosecutors establish internal guidelines on seeking the death penalty in cases that are built exclusively on types of evidence (stranger eyewitness identification, statements of informants and co-defendants) that are particularly subject to human error.				X		
Require prosecutors to engage in a "period of reflection and consultation" before deciding whether to seek the death penalty.				X		
Role of Jury and Judge						
Allow juries to deliberate case before jury instructions are given by judge.	X					
Require judicial training in capital cases every two years.		X				
Require judge to inform jury about all statutorily authorized sentencing options, including true length of LWOP sentence. (ABAG would require introduction of evidence regarding				X	X	

Recommendation	AZ	ILCT	IDPEP	CPDPI	ABAR	ABAG
clemency and parole practices at defendant's request.)						
Prohibit override of jury recommendations against a sentence of death.				X		
Where judge finds it appropriate, require instruction that lingering doubt may be considered in mitigation.				X		
Require judge to make sure each juror understands individual obligation to consider mitigating circumstances.				X		
Work with attorneys, judges, linguists, social scientists, psychologists, and jurors themselves to develop jury instructions that ordinary jurors can understand, with special emphasis on explaining nature of aggravation and mitigation, how weighing process works, and fact that sentence of death is never required.						X
Take steps to ensure that death penalty views are not used as a "litmus test" for judicial appointment, or as a campaign issue for elected judges.						X
Appellate Review						
Amend rules to expedite completion of record for direct appeal.	X					
Ensure that proceedings are not expedited so as to impede full and deliberate consideration of claims.						X
Take steps to ensure that courts exercise independent judgment in deciding cases, making findings of fact and conclusions of law only after fully and considering the evidence and applicable law.						X

Recommendation	AZ	ILCT	IDPEP	CPDPI	ABAR	ABAG
Apply a "knowing, understanding, and voluntary" standard for waiver of claims of constitutional error, and apply plain error rule liberally with respect to errors of state law in capital cases.						X
Give full retroactive effect to all U.S. Supreme Court rulings in all proceedings.						X
Permit successive postconviction proceedings in capital cases where counsels' omissions or intervening court decisions resulted in possibly meritorious claims' not previously being raised, factually developed, or accepted as legally valid.						X
The clemency decision making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case, and decisions should be based on independent consideration of facts and circumstances.						X
Prior to clemency proceedings, counsel should be entitled to compensation and access to investigative and expert resources.						X
Fairness and Proportionality						
Require that sentencing hearing include victim's family information, allocution from defendant, and that sentence be withheld for seven days to allow full consideration of all aggravation and mitigation.	X					
Study how to create statewide statistical database on capital cases.		X				
Mandate periodic study and review of proportionality and racial justice in capital sentencing.			X			

Recommendation	AZ	ILCT	IDPEP	CPDPI	ABAR	ABAG
Create mechanisms to help ensure that death penalty is not applied in racially discriminatory manner.		X		X	X	X
Rigorously gather data on operation of capital punishment system and role of race in it.				X		X
Bring members of all races into every level of decision-making process.				X		
Allow defendant to challenge death sentence on basis of racial discrimination.						X
Adopt procedures for proportionality review to ensure that death sentences are imposed in fair and even-handed manner.				X		
Other						
Require commutation of death sentence to maximum sentence lawfully possible upon finding that defendant is not competent to be executed.	X					
Adopt LWOP as sentencing option in all death penalty cases in all jurisdictions.				X		